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For participants only

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International Law Commission
Seventieth session (second part)

Provisional summary record of the 3417th meeting
Held at the Palais des Nations, Geneva, on Monday, 2 July 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Protection of the atmosphere (agenda item 8) (*continued*) (A/CN.4/711)

Report of the Drafting Committee (A/CN.4/L.909)

The Chair invited the Chair of the Drafting Committee to present the report of the Drafting Committee on the topic "Protection of the atmosphere", as contained in document A/CN.4/L.909.

Mr. Jalloh (Chair of the Drafting Committee), noting the progress the Commission had made during the first part of its seventieth session, which had been held in New York, said that the report of the Drafting Committee contained the preamble and 12 draft guidelines that had been completed on first reading, including 3 draft guidelines that had been considered and adopted at the current session.

He wished to pay tribute to the Special Rapporteur, Mr. Murase, whose mastery of the subject, constructive spirit and cooperation had greatly facilitated the work of the Drafting Committee. Thanks were also due to the members of the Drafting Committee for their valuable contributions to a successful outcome and to the Secretariat for its invaluable assistance. He hoped that the members of the Drafting Committee who had participated in the discussions while continuing to express reservations with respect to the topic and who had later joined the consensus, would not seek to reopen or block the adoption by the plenary of consensus text that had already been provisionally adopted by the Drafting Committee without any formal objections. Of course, that was without prejudice to any reserving member's right to state his or her position in the plenary record in the usual way.

The Drafting Committee had devoted five meetings — on 29, 30 and 31 May 2018 — to its consideration of the draft preamble and the draft guidelines referred to it by the Commission. It had examined the three draft guidelines initially proposed by the Special Rapporteur in his fifth report (A/CN.4/711), together with a number of reformulations that the Special Rapporteur had proposed in the light of suggestions and concerns that had arisen during the debates in the plenary and in the Drafting Committee. The Commission had previously provisionally adopted draft guidelines 1 to 9 and a draft preamble on the topic, while the Drafting Committee had provisionally adopted, at the current session, three new draft guidelines, namely draft guidelines 10, 11 and 12. The Drafting Committee had subsequently undertaken a *toilettage* of the draft preamble and the draft guidelines in their entirety, during which it had made a substantive change to guideline 2 and a cosmetic change to guideline 9. He recommended that, in line with the Commission's previous practice, the plenary should take action only on the new or amended draft guidelines.

The draft preamble remained as provisionally adopted by the Commission, except for the removal of the ellipsis and the text in brackets indicating that further preambular paragraphs might be added, given that the work on the topic had now been completed. Such text had been periodically included, since language from some guideline proposals had been moved to the draft preamble as work on the topic progressed. At the current session, a number of preamble-related proposals, including textual ones and others relating to the ordering of the paragraphs had been made, but they had been only briefly discussed by the Drafting Committee. The collective sense of the Committee had been that the preambular language as a whole should be carefully considered, and amended where appropriate, during the second reading stage, as was the Commission's usual practice. In his summing up of the plenary debate that had taken place during the current session, the Special Rapporteur had indicated that he would make proposals regarding the preamble during the second reading.

Draft guideline 1, on the use of terms, remained as previously adopted. It contained definitions of the key terms vital to the understanding of the topic, namely "atmosphere", "atmospheric pollution" and "atmospheric degradation".

Regarding draft guideline 2, on the scope of the guidelines, it would be recalled that paragraph 1 had been adopted by the Commission with alternative formulations in brackets, namely "[contain guiding principles relating to]" and "[deal with]", which had been left subject to further consideration. Upon review of the entire set of draft guidelines, the

Drafting Committee had considered the words "address", "relate to" and "concern", and had concluded that "concern", which had been used in defining the scope of the topic "Identification of customary international law", was the most appropriate option. Thus, paragraph 1 had been adopted using the term "concern", which had been preferred over the phrases "contain guiding principles relating to" and "deal with". Paragraph 1 therefore now read: "The present draft guidelines concern the protection of the atmosphere from atmospheric pollution and atmospheric degradation." No changes had been made to paragraphs 2 to 4 of the draft guideline. The Drafting Committee had discussed whether to revisit the use of the words "deal with" in paragraphs 2 and 3. While some members had felt that the formulation could be improved, others had observed that it had been carefully negotiated as part of the understanding concerning the topic. It had therefore been left as it was in order to avoid reopening potentially sensitive issues.

Draft guidelines 3 to 8, which addressed, respectively, the obligation to protect the atmosphere, environmental impact assessment, sustainable utilization of the atmosphere, equitable and reasonable use of the atmosphere, intentional large-scale modification of the atmosphere and international cooperation, remained as previously adopted. The discussions and logic underpinning those draft guidelines could be found in the statements of the Chair of the Drafting Committee, which were available in the relevant section of the Commission's website.

No substantive changes had been made to draft guideline 9, on the interrelationship among relevant rules, although an issue of punctuation had been addressed. It would be recalled that the previously adopted draft guideline 9 contained three paragraphs regarding the relationship between rules of international law concerning the atmosphere and other relevant rules of international law. The only amendment had been to paragraph 1: commas had been inserted before and after the words "*inter alia*" for the purposes of *toilettage*. The import of the guideline remained the same, since the change was not a substantive one. As had been explained by the Chair of the Drafting Committee in 2017, the reference to "including *inter alia* the rules of international trade and investment law, of the law of the sea, and of international human rights law" in draft guideline 9 (1), reflected "the concern within the Drafting Committee to capture, on the one hand, the practical importance of those three areas to the atmosphere, and, on the other, the risk of overlooking other fields of law, which might be equally relevant". The addition of the commas had the effect of underscoring that "without prejudice" categorization and hopefully would help settle any future questions by establishing that the list of relevant fields of law was not exhaustive or intended to be so.

Draft guideline 10, the first of the three new draft guidelines provisionally adopted by the Drafting Committee at the current session, concerned implementation. It consisted of two paragraphs, which addressed, on the one hand, existing obligations under international law, and, on the other hand, recommendations contained in the draft guidelines. Paragraph 1 read:

> "National implementation of obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation, including those referred to in the present draft guidelines, may take the form of legislative, administrative, judicial and other actions."

The text of paragraph 1 initially proposed by the Special Rapporteur in his fifth report had been modified to reflect the idea that States might implement their obligations at the national level, without stipulating the form of such implementation. The Special Rapporteur's proposed language — "States are required to implement in their national law the obligations" — had therefore been replaced with "national implementation of obligations under international law". The Drafting Committee had agreed that the term "national implementation" would be clarified in the commentary to take into account the various ways in which obligations under international law might be implemented, including situations in which obligations of regional organizations, such as the European Union, might be implicated.

Regarding the use of the term "obligations", the Special Rapporteur had explained that the provision did not impose or create new obligations on States; rather, it referred to

States' existing obligations under international law. The phrase "obligations affirmed by the present draft guidelines" had therefore been replaced with "including those referred to in the present draft guidelines", the use of the expression "referred to", as opposed to "affirmed by", having been seen as a means of clarifying that the draft guidelines did not create new obligations and were not comprehensive of the issues related to the topic. It had been observed that many of the earlier draft guidelines, for instance draft guidelines 5, 6 and 7, had used the word "should", making them more recommendatory in nature, while other draft guidelines, such as draft guidelines 3, 4 and 8, referred to States as having "the obligation".

With regard to the forms of national implementation, the word "may" had been used in place of the words "required to", as originally proposed by the Special Rapporteur, in order to reflect the elective nature of the provision. It had been agreed that the commentary would explain that if national implementation was indeed required, it might take different forms. The reference to "administrative" action, as proposed in the fifth report, had been retained. As suggested in the plenary, the Drafting Committee had discussed whether it would be more appropriate to use the word "executive"; however, "administrative" had been deemed the more encompassing word since it covered "executive" actions by lower levels of government administration. At the end of the sentence, the words "other actions" covered all other forms of national implementation.

With regard to paragraph 2 on the subject of the responsibility of States, as originally proposed by the Special Rapporteur in his fifth report and revised by him to take into account the views of members expressed during the plenary debate, the members of the Drafting Committee had agreed that the paragraph was unnecessary for the purposes of the draft guidelines under consideration. In the main, it had been considered that the Commission had already addressed the secondary rules of responsibility, having adopted in 2001 the draft articles on responsibility of States for internationally wrongful acts. Those rules would therefore apply, *mutatis mutandis*, in relation to environmental matters, including the protection of the atmosphere from atmospheric pollution and atmospheric degradation. On the other hand, the Special Rapporteur had stressed that some States had indicated that the issue of responsibility should be addressed directly rather than in the form of a "without prejudice" clause. He had further suggested that the element of "damage", which would be relevant to the topic, had in any event not been incorporated into the secondary rules of State responsibility under the 2001 draft articles and had been left to be determined by the primary rules. Nonetheless, the Drafting Committee had concluded that a paragraph on the subject, even if it were framed as a "without prejudice" clause, would unbalance the text of the draft guidelines and would not do justice to a subject that the Commission had taken many years to complete. The paragraph had therefore been deleted, and the Special Rapporteur had indicated that the issue would be dealt with, as appropriate, in the commentary.

Paragraph 2, as adopted by the Drafting Committee, read: "States should endeavour to give effect to the recommendations contained in the present draft guidelines." The members of the Drafting Committee had agreed that the reference to "the recommendations contained in the present draft guidelines" was intended to distinguish it from "obligations", as used in paragraph 1 of draft guideline 10. They had concluded that the use of "recommendations" was appropriate, on the understanding that the meaning of the word would be clarified in the commentary and that it would be consistent with the draft guidelines, which used the word "should". The reference to "recommendations" was not intended to dilute any normative content of any of the draft guidelines.

The Drafting Committee had also discussed whether the term "good faith", as proposed by the Special Rapporteur, should be retained, how it should be used and whether it was to be understood within the meaning of the Vienna Convention on the Law of Treaties. While the Special Rapporteur had explained that the concept of "good faith" was intended to capture both legal and ethical dimensions, the members of the Drafting Committee had agreed that, under environmental law, the term had a specific meaning and entailed specific legal obligations, which were not necessarily covered in the draft guidelines, and had therefore deleted it.

With regard to proposed paragraph 4, which addressed extraterritorial application of national law by a State to the extent permissible under international law, the Drafting Committee had decided that the paragraph was not necessary for the purposes of the draft guidelines. The reason for that was that the matter of extraterritorial application of national law, by a State, raised a host of complex legal and other questions with far-reaching implications for other States and for their relations with each other. In such circumstances, under which further consideration of the practice of States on the issue would be required considering the global commons nature of the atmosphere, it had been widely agreed that the issue of extraterritoriality could not be addressed satisfactorily in a single paragraph. Accordingly, the paragraph had consequently been deleted, and the question of extraterritoriality would be addressed, as appropriate, in the commentary.

Draft guideline 10 was entitled "Implementation", as originally proposed by the Special Rapporteur.

Draft guideline 11, entitled "Compliance", had been restructured with a view to streamlining the original proposal by the Special Rapporteur. The draft guideline, which complemented draft guideline 10 on implementation, reinforced the principle *pacta sunt servanda*, even though its main focus was on the existing compliance mechanisms that might be used. It comprised two paragraphs. Paragraph 1 read:

> "States are required to abide with their obligations under international law relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation in good faith, including through compliance with the rules and procedures in the relevant agreements to which they are parties."

The text of paragraph 1 had been modified to better align it with the principle of *pacta sunt servanda*, while, at the same time, focusing on the existing compliance mechanisms. The words "States are required to effectively comply" had been replaced with "States are required to abide with". In addition, the Drafting Committee had replaced the words "international law norms" with "obligations under international law", while further specifying linkage to those obligations concerning "protection of the atmosphere from atmospheric pollution and atmospheric degradation". The latter formulation served to harmonize the language of paragraph 1 with the language used throughout the draft guidelines. The Drafting Committee had felt that the broad nature of such "obligations under international law" better reflected the reality that treaty rules constituting obligations might, in some cases, be binding only on the parties to the relevant agreements, while other rules might reflect or later crystallize into customary international law with consequent legal effects for non-parties.

The phrase "multilateral environmental agreements", as proposed by the Special Rapporteur, had been replaced with "relevant agreements to which they [the States] are parties", to avoid narrowing the scope of the provision. The "relevant agreements" referred to would include multilateral, regional or other trade treaties that might also contemplate environmental protection provisions, including exceptions such as those under article XX of the 1947 General Agreement on Tariffs and Trade or even so-called environmental side agreements such as the North American Agreement on Environmental Cooperation. The Drafting Committee had considered that paragraph 1 should serve as an introduction to paragraph 2.

Paragraph 2 dealt with the facilitative or enforcement procedures that might be used by compliance mechanisms and covered the ideas encapsulated in paragraphs 2, 3 and 4 as originally proposed by the Special Rapporteur.

The chapeau of paragraph 2 read: "To achieve compliance, facilitative or enforcement procedures may be used, as appropriate, in accordance with the relevant agreements:" The opening phrase "For non-compliance", as proposed by the Special Rapporteur, had been replaced with "To achieve compliance" in order for the paragraph to begin with a purposive positive approach and for its wording to be aligned with that of existing agreements. Similarly, the word "approaches" had been replaced with "procedures" to reflect the use of the latter term in such agreements, while the words "may be used, as appropriate," emphasized the differing circumstances and contexts in which facilitative or enforcement procedures could be deployed to nudge compliance. The

expression "and/or" in the original version of paragraph 2 had been replaced with "or" to present such procedures as alternatives to be considered by the competent organ established under the agreement concerned. At the end of the chapeau, the words "in accordance with the relevant agreements" had been used, since the members of the Drafting Committee had agreed that the commentary would emphasize that facilitative or enforcement procedures were those provided for under existing agreements to which States were parties and that such procedures would operate in accordance with such agreements.

Besides the chapeau, paragraph 2 comprised two subparagraphs (a) and (b), which had been based on paragraphs 3 and 4 originally proposed in the fifth report. The structure and punctuation of the subparagraphs indicated that existing regimes were not affected by facilitative or enforcement procedures. The subparagraphs read:

> "(a) facilitative procedures may include providing assistance to States, in cases of non-compliance, in a transparent, non-adversarial and non-punitive manner to ensure that the States concerned comply with their obligations under international law, taking into account their capabilities and special conditions;
>
> (b) enforcement procedures may include issuing a caution of non-compliance, termination of rights and privileges under the relevant agreements, and other forms of enforcement measures."

In both subparagraphs, the word "may" had been added before "include" in order to provide States with flexibility in the use of the existing facilitative or enforcement procedures. In addition, at the beginning of both subparagraphs, the words "facilitative measures" and "enforcement approaches" had been replaced with the words "facilitative procedures" and "enforcement procedures" respectively, to align the subparagraphs with the chapeau of paragraph 2.

In subparagraph (a), the word "non-complying" before "States", initially proposed by the Special Rapporteur, had been deleted, since some members had felt that it had negative and punitive connotations, when compliance procedures were in fact intended to induce compliance. Based on the Montreal Protocol on Substances that Deplete the Ozone Layer, article 8 of which contained the phrase "Parties found to be in non-compliance", the Drafting Committee had considered it more appropriate to use the words "in cases of non-compliance" and refer to "the States concerned". In the last part of the sentence, the words "taking into account their capabilities and special conditions" had been considered necessary, in recognition of the specific challenges often faced by developing and least developed countries in the discharge of obligations relating to environmental protection. Those challenges tended to arise from a general lack of capacity which could sometimes be mitigated by the receipt of external support to build capacity to facilitate compliance with their obligations under international law.

In subparagraph (b), the words "multilateral environmental agreements" had been replaced with "relevant agreements", for the reasons already explained. Following lengthy debate, the members of the Drafting Committee had agreed to replace the term "sanctions", originally proposed in the fifth report at the end of paragraph 4, with "enforcement measures" which had been deemed more appropriate for the purposes of the draft guidelines in order to avoid confusion with references to unilateral sanctions or the sometimes negative connotation of the term "sanctions".

Draft guideline 11 was entitled "Compliance", as originally proposed by the Special Rapporteur.

Turning to draft guideline 12, on dispute settlement, he said that a discussion had taken place within the Drafting Committee about whether it would be appropriate for the Commission to adopt such a draft guideline. Although some members had remained unconvinced, the majority had agreed on the need to include one. It had been felt that, if disputes relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation arose between States, they should be settled in accordance with international law, using established mechanisms. The purpose of the draft guideline as provisionally adopted was solely to describe the principle of the peaceful settlement of disputes between States, without delimiting specific forms, and to address the use of

technical and scientific experts in such disputes. The Drafting Committee had settled on a simpler formulation than that initially proposed by the Special Rapporteur. Draft guideline 12 comprised two paragraphs.

Paragraph 1 read: "Disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means." The paragraph described the general obligation of States to settle their disputes by peaceful means. The expression "between States" had been added to clarify that the disputes referred to in the paragraph were inter-State in nature. The Drafting Committee had considered that the reference to Article 33 (1) of the Charter of the United Nations, as originally proposed, should be deleted, as a wide variety of amicable means of dispute settlement could be found in the practice of States. The intent, in omitting the specific reference to Article 33, had not been to downplay the significance of the various pacific means mentioned in that provision, such as negotiation, enquiry, use of good offices, mediation, conciliation, arbitration, judicial settlement or resort to other peaceful means that might be preferred by the States concerned. There had been agreement among the members of the Drafting Committee that he should highlight, in his statement before the plenary Commission, that the provision was not to be construed in any way that might interfere with or displace existing dispute settlement provisions in treaty regimes, which would continue to operate on their own terms. It had further been agreed that, given its importance, that point should be explained in the commentary. The Drafting Committee had ultimately concluded that the commentary should emphasize that the main purpose of the paragraph was to reaffirm the principle of peaceful settlement of disputes and to serve as a primer for paragraph 2.

Paragraph 2 read: "Given that such disputes may be of a fact-intensive and science-dependent character, due consideration should be given to the use of technical and scientific experts." The first part of the sentence implicitly recognized that disputes in the area of protection of the atmosphere would be "fact-intensive" and "science-dependent". Those elements, evident from the experience of inter-State environmental disputes, would typically require specialized expertise to contextualize or grasp fully the issues in dispute. For that reason, it wo ld be necessary for "due consideration" to be given to the use of technical and scientific experts.

The Drafting Committee had decided not to retain the original proposal from the Special Rapporteur's fifth report concerning proper assessment of scientific evidence and party appointment and cross-examination of experts, in order to focus on the essential aspect, which was the use of technical and scientific experts in the settlement of inter-State disputes whether by judicial or other means. The reference to "the rules and procedures concerning, inter alia, the use of experts in order to ensure proper assessment of scientific evidence, if such disputes are to be settled by arbitration or judicial procedures" had been replaced with "the use of technical and scientific experts". The Drafting Committee had considered that the reference and the last two sentences of the original proposal, concerning the appointment of experts and their use by the parties or those mandated to settle the dispute or determine the relative weight to be accorded to scientific evidence, were descriptive in nature and would be better addressed in the commentary. As a result, they had been deleted.

There had been wide agreement among the members of the Drafting Committee that the originally proposed paragraph 3, which dealt with the principles of *jura novit curia* and *non ultra petita* in the context of the judicial settlement of disputes that might arise in relation to the protection of the atmosphere, was not necessary for the purposes of the draft guidelines and that the issues raised therein would be more appropriately dealt with in the commentaries. Consequently, the paragraph had been deleted.

Draft guideline 12 was entitled "Dispute settlement", as proposed by the Special Rapporteur in his fifth report.

After completing its work on the draft guidelines, the Drafting Committee had adopted the title of the entire text of draft guidelines on first reading, namely "Guidelines on Protection of the Atmosphere".

Mr. Huang said that the Drafting Committee had deleted almost half of the text of draft guidelines 10 to 12 as proposed by the Special Rapporteur in his fifth report and had changed what remained beyond recognition, with a result that looked good on paper but risked proving useless in practice. For example, draft guideline 10 (2) and (4), and draft guideline 12 (3) had been removed entirely, while draft guideline 10 (1) had been stripped of its most important provision through the deletion of the reference to States being "required to implement in their national law the obligations affirmed by the present draft guidelines".

In view of the deletion of provisions to which the Special Rapporteur had previously attached considerable importance, he wondered whether what was left of draft guidelines 10 to 12 could provide meaningful, practical guidance to Member States. During the intersessional period, he had sounded out government officials and legal experts in charge of environmental protection, whose response had largely been to question whether the Commission was achieving anything. Indeed, it was shocking to note how the draft guidelines, in their current form, were devoid of substance and characterized by either ambiguous and barely comprehensible legal jargon or truisms and redundancies. For instance, the provision in draft guideline 12 (1) that "disputes between States relating to the protection of the atmosphere from atmospheric pollution and atmospheric degradation are to be settled by peaceful means" was a self-evident, universal norm and a basic principle of the Charter of the United Nations. The outcome of the work of the Drafting Committee appeared to vindicate the view, expressed by some Commission members in plenary, that the draft guidelines ought not to have been referred to the Committee at all.

In recent years, there had been some undesirable developments and tendencies within the Commission. During the consideration of certain topics, good traditions and sound methods of work had been compromised, and there had been a failure to respect fully the views of all members. Worse still, efforts to reach consensus on important matters had been abandoned, an extremely serious issue that should receive the Commission's full attention.

He wished to stress that, as a former special representative of his country's Ministry of Foreign Affairs for climate change negotiations, he was not opposed to the protection of the atmosphere, nor did he intend to block the adoption of the draft guidelines on first reading. However, he continued not to support the Commission's consideration of the topic "Protection of the atmosphere" and had doubts over the usefulness of the 12 draft guidelines adopted by the Drafting Committee.

The Chair said that he appreciated the spirit of cooperation displayed by Mr. Huang in not standing in the way of the adoption of the draft guidelines by the plenary Commission on first reading.

Mr. Park said that when the Drafting Committee had discussed paragraph 2 of draft guideline 10, he and other members had expressed concern that, given the Committee's decision to delete the paragraph, dealing with the issue of State responsibility in the commentary might confuse readers. That concern should have been reflected in the statement of the Chair of the Drafting Committee, especially as the text of the statement would be made publicly available.

Mr. Jalloh (Chair of the Drafting Committee) said that he had endeavoured to reflect faithfully the discussion held by the Drafting Committee and would be willing to find language that captured the point made by Mr. Park.

Mr. Petrič said that the statement reflected most of the issues raised by Commission members in plenary and that the draft preamble and draft guidelines should be adopted as they stood in order to enable Member States to have their say.

Mr. Murase (Special Rapporteur) said that he wished to express his heartfelt appreciation to the Chair of the Drafting Committee for his superb work, which had culminated in the adoption of the draft guidelines by the Committee, despite some challenges. The Committee had tried its utmost to retain the basic structure of the draft guidelines that he had proposed in his fifth report. He agreed fully with the changes that had

been made and was satisfied with the outcome. The issue of State responsibility should be addressed when the Commission convened in plenary to discuss the commentaries.

The Chair invited the Commission to adopt draft guideline 2, as revised, and draft guidelines 10, 11 and 12.

Draft guideline 2

Draft guideline 2 was adopted.

Draft guidelines 10 to 12

Draft guidelines 10 to 12 were adopted.

The Chair said that he took it that the Commission wished to adopt, on first reading, the texts and titles of the draft guidelines and preamble on the protection of the atmosphere, as contained in document A/CN.4/L.909.

It was so decided.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

Mr. Nolte said that he wished to thank the Special Rapporteur for his rich third report on *jus cogens*, which covered many important questions in a crucial area of international law. The Commission needed to deal with such questions in a particularly careful way. Any premature conclusions could have serious effects on the state and the working of the international legal system.

The procedural rules set out in articles 42 and 65 of the 1969 Vienna Convention on the Law of Treaties were of great importance for ensuring the stability of treaty relations and for preventing incorrect or abusive invocations of *jus cogens*. It was therefore crucial that those articles should be taken as the point of departure when considering the relationship between the rules regarding the consequences of *jus cogens* and the procedure by which the existence of a *jus cogens* norm was determined. Such rules needed to be reaffirmed.

That being said, national and regional courts had occasionally raised the issue of whether a particular treaty, or treaty-based decision, violated a norm of *jus cogens*, without making the consequences of such a violation dependent on following the procedure under the Vienna Convention. It would indeed be difficult for national or regional courts to suspend the effects of their judgments, if they concluded that a treaty violated a norm of *jus cogens*, until the States concerned had followed the procedure under the Vienna Convention. That did not mean, however, that the obligation of States under the Vienna Convention to follow the procedure did not also apply in such cases; it did indeed apply. Therefore, a State whose court had declared a treaty to be invalid because it would conflict with a *jus cogens* norm must notify other States; and a State that considered that the court of another State had wrongly declared a treaty to be invalid for the same reason could choose to follow the procedures under articles 65 and 66 of the Vienna Convention.

An even more important question was whether States that were not bound by articles 65 and 66 of the Vienna Convention — either because they had not ratified the Convention or because they had entered reservations with respect to article 66 — could simply invoke the invalidity of a treaty as a result of a violation of a norm of *jus cogens*, or whether such States must or should follow at least certain basic elements of the procedure laid down in the Vienna Convention before being able to draw any consequences from their view that a treaty violated a norm of *jus cogens*. There was no easy answer to that question. So far, relevant practice seemed sparse. It was clear, however, that the recognition of *jus cogens* and its effects, by the Vienna Convention, was premised on the requirement that a State could not unilaterally draw consequences when it considered that a treaty was void because the treaty violated a norm of *jus cogens*. Draft conclusion 14, by recommending States to submit the matter to the jurisdiction of the International Court of Justice, seemed incorrectly to imply that they were free to do so. While it was true that States that were not bound by the Vienna Convention were obviously not bound by article 66, which established

the jurisdiction of the International Court of Justice, the rules contained in article 65 were more than mere treaty obligations. Rather, article 65 expressed certain generally recognized rules that should be recognized in the draft conclusions. After all, in paragraph 109 of its judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had noted the following regarding articles 65 to 67: "... if not codifying customary international law, [they] at least generally reflect customary international law and contain certain procedural principles which are based on the obligation to act in good faith." He therefore proposed inserting a new paragraph above the current paragraph 1 of draft conclusion 14, to read:

> "A State party which invokes the invalidity of a treaty as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify the other parties of its claim. If another party raises an objection, the States parties concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking party may give effect to its claim in relation to any objecting party after the invalidity of the treaty has been determined as agreed by them."

The proposed additional paragraph reflected the basic elements of article 65 of the Vienna Convention, using language from that provision. While article 65 was generally supported during the elaboration of the Vienna Convention, it was well known that article 66 had attracted several reservations and objections to those reservations. However, the basic elements of article 65, as they were reflected in the proposed additional paragraph, expressed certain core rules that flowed from the generally recognized obligations to act in good faith and to settle disputes peacefully. The rules acquired their specific character in the present context from the importance of the question under which circumstances the fundamental principle of *pacta sunt servanda* might be called into question by States parties when invoking *jus cogens*.

The question of the procedure by which a conflict with a *jus cogens* norm was determined arose with respect not only to treaties but also to other sources of law and of obligations, as covered in draft conclusions 15 to 17. It was his view that the same procedural rules should apply for all sources of law and obligations. He therefore proposed that the additional paragraph that he had put forward in respect of draft conclusion 14 should either be added, *mutatis mutandis*, to draft conclusions 15 to 17, or, preferably, that the Commission should formulate a general draft conclusion on procedure. Such a draft conclusion would read:

> "A State which invokes the invalidity of an obligation as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify other States concerned of its claim. If another State raises an objection, the States concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking State may give effect to its claim in relation to any objecting State after the invalidity of the obligation has been determined as agreed by them."

The proposed new paragraph did not address all the questions that might arise in the context, including the issue of whether a treaty was presumptively valid if States parties were unable to agree on a way to determine if a treaty was invalid because it would violate a norm of *jus cogens*. It would clearly be preferable for the Commission to formulate a conclusion in that respect. If it did so, it should take care not to be overly influenced by the distrustful attitudes that many States had displayed towards the International Court of Justice in the 1960s and 1970s, following its 1966 judgment in the *South West Africa* cases.

Turning to the individual draft conclusions, he said that draft conclusion 10 was a good point of departure with regard to the consequences of *jus cogens*, although he had doubts regarding the second sentences of paragraphs 1 and 2. While supporting the thrust of paragraph 3, he did not see why the rule of interpretation contained therein should not also apply to rules of customary international law and other sources of obligations that were addressed in other proposed draft conclusions, especially draft conclusions 15 to 17. Moreover, if there were a general rule of interpretation, it would not be necessary to repeat the rule in draft conclusion 17 (2), specifically for resolutions of international organizations.

He supported paragraph 2 of draft conclusion 11; however, subparagraphs 2 (b) and (c) were superfluous and might even be misleading, principally because they covered matters that were already addressed in subparagraph (a). As for paragraph 1 of draft conclusion 11, it was true that the paragraph reflected the Commission's views in the lead-up to the adoption of the 1966 draft articles on the law of treaties. There was, moreover, a strong argument in favour of draft conclusion 11 (1), according to which the non-severability rule emphasized the importance of *jus cogens* and provided a sanction and a deterrence against violations of *jus cogens*. Those facts notwithstanding, he had pragmatic doubts about the content of paragraph 1. By way of example, he noted that the General Assembly had declared in 1979 in its resolution 34/65 "that the Camp David accords and other agreements have no validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967." The Assembly thereby seemed to have expressed the view that certain provisions of the Camp David accords would remain valid even if others violated a norm of *jus cogens* which existed prior to the conclusion of the treaty. Given the increase, since the 1960s, of the number of norms that were arguably *jus cogens* and given the complexity of many treaties that had been concluded thereafter, it was likely that specific rules from treaties that were otherwise unobjectionable might be called into question as violating *jus cogens*. He wondered whether it would be necessary or appropriate to request the parties to such a treaty to revise it as a whole in cases in which an interpretation of the treaty concerned in conformity with *jus cogens* norms was not possible. Perhaps, then, the Commission should consider basing the entire draft conclusion on the severability approach contained in paragraph 2 of draft conclusion 11, with a presumption that the whole treaty was void in a case like that set out in article 53 of the Vienna Convention. Draft conclusion 11 could also be extended to cover secondary treaty law, namely acts of international organizations that created obligations for States.

He agreed that draft conclusion 12, which dealt with the duty to eliminate consequences of a treaty that conflicted with *jus cogens*, should be based on article 71 of the Vienna Convention. However, the phrase "as far as possible", which appeared in paragraph 1 (a) of that article, should not be omitted, as it was important in assuring that the legal effect of rules of *jus cogens* remained practicable. He supported in principle draft conclusion 13, although its placement should be discussed.

With regard to draft conclusions 15 to 17, he agreed with the Special Rapporteur that it was not necessary to address the consequences of peremptory norms on general principles of law. He could not conceive of a situation in which a general principle of international law could conflict with a norm of *jus cogens*. If such a situation were to be asserted by a State, the general principle of law would surely be interpreted in a way that would render it consistent with *jus cogens*. While he generally supported draft conclusion 15, he wondered why the words "not of a *jus cogens* character" appeared only in paragraph 2 and not in paragraph 1. As it was currently formulated, paragraph 1 seemed to exclude the possibility of replacing one rule of *jus cogens* with another — a possibility that was envisaged in article 64 of the Vienna Convention.

In draft conclusion 16, the expression "unilateral act" could, in the context, give rise to the misunderstanding that purely factual acts could be invalidated by *jus cogens*. When adopting its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations in 2006, the Commission, acknowledging that the term "unilateral act" could give rise to misunderstandings, had clarified that it referred to "juridical act[s that] necessarily impl[y] an express manifestation of a will to be bound on the part of the author State". That should be made clear in the context of the topic of *jus cogens*, for example by replacing the term "unilateral act" with "unilateral commitment".

Regarding draft conclusion 17, he agreed with the Special Rapporteur that it was useful to cover, in the context of *jus cogens*, the acts of international organizations that created legal obligations and that such acts, if and insofar as they conflicted with *jus cogens* norms, were invalid. However, he was not convinced that the draft conclusion should be limited to binding resolutions, and even less so that it should single out one specific form of binding resolutions — those of the Security Council of the United Nations. The fact that there had been major debates on the relation of Security Council resolutions with norms of

jus cogens did not justify such a narrow focus in a project that was aimed at formulating general rules. Otherwise, the Commission would risk being misunderstood as taking a generally distrustful position *vis-à-vis* the Security Council and its resolutions.

He broadly agreed with draft conclusions 18 to 21, although he suggested that, in draft conclusion 21, the word "serious" should be inserted before the phrase "breach of a peremptory norm", consistent with the language of article 41 (2) of the articles on State responsibility for internationally wrongful acts.

He was not convinced by the assertion in the Special Rapporteur's report that draft conclusions 22 and 23, on criminal responsibility, were "effects of peremptory norms of general international law (*jus cogens*) on individual criminal responsibility in international criminal law". First, the Commission's work on the topic of *jus cogens* was based on a distinction between the rules regarding the methodology for determining all rules of *jus cogens* and their effects, on the one hand, and the rules that might be contained in a possible, "illustrative", list of specific rules of *jus cogens*, on the other. The Special Rapporteur had confirmed that distinction by asking members, when introducing his second report (A/CN.4/706), to convey their views on whether an illustrative list of specific norms of *jus cogens* should be formulated. Given that no proposal had been made by the Special Rapporteur to that effect and that the Commission had not yet taken a decision on the matter, the third report should attempt only to address the effects that were applicable to all rules of *jus cogens*. Draft conclusions 22 and 23, however, concerned only certain, specific rules of *jus cogens*, the prohibitions of international crimes, and a limited number of possible specific effects that might result from those prohibitions. For that reason alone, draft conclusions 22 and 23 were not part of what the Commission had agreed to cover as part of the topic at the current stage.

Secondly, even if the term "effect (or consequence) of *jus cogens*" were to extend, at the current stage, to the possibility of addressing specific consequences of specific rules of *jus cogens* — which was not the case — the Commission would then also have to deal with other such specific consequences. The right of self-determination, for example, was said to produce certain specific consequences, but those were not addressed in the report. It was therefore selective to cover a limited number of possible specific effects of international crimes and not of other specific *jus cogens* norms.

Thirdly, even if it were appropriate, in the current context, to address specifically the effects of international crimes as norms of *jus cogens*, the third report did not do so in accordance with the methodological requirements set out provisionally by the Drafting Committee. A thorough analysis of State practice in all its forms was necessary, according to provisionally adopted draft conclusions 5 and 6, by identifying, first, a norm of general international law — most commonly a rule of customary international law — and, secondly, a specific *opinio juris* of States according to which a particular rule of customary international law had a peremptory character. Those requirements constituted a high threshold that were not addressed in the third report. If in his report the Special Rapporteur was asserting that draft conclusions 22 and 23 were not themselves *jus cogens* but nevertheless effects of *jus cogens*, he wondered what criteria should be used for determining that a simple rule of customary international law was the effect of a *jus cogens* norm.

The Special Rapporteur, in his report, merely attempted to demonstrate that draft conclusions 22 and 23 had some support in practice, and that they flowed from the character of international crimes. The Commission did not usually consider that type of reasoning to be sufficient for identifying a rule of customary international law or a norm of *jus cogens*, as confirmed in its recently adopted conclusions on the identification of customary international law and in the provisionally adopted draft conclusions on the topic of *jus cogens*. It was not sufficient, in order to demonstrate certain further effects, to demonstrate that international crimes were *jus cogens* norms; rather, it was necessary to show that a large majority of States accepted and recognized as *jus cogens* a particular effect of such a norm. The third report did not fulfil such requirements. Instead, the Special Rapporteur had attempted to draw conclusions by way of theoretical reasoning, despite having rejected that approach in his general remarks at the beginning of the third report. It was also not sufficient to invoke certain instances of practice when they were far from

being generally accepted as rules of *jus cogens*. Thus, even if the reasoning behind draft conclusions 22 and 23 established that those draft conclusions reflected customary international law, it would be insufficient to show that they were effects of international crimes.

Fourthly, the reasoning provided in respect of draft conclusion 23 (2) was particularly incomplete and therefore unpersuasive. The assertion that the rule that the Commission had provisionally adopted as draft article 7 in the context of the topic "Immunity of State officials from foreign criminal jurisdiction" was an effect of the norm of *jus cogens* that prohibited the commission of core international crimes was surprising. In its debate on that draft article at its previous session, the Commission had also discussed whether it constituted a rule of customary international law, in the sense of a rule of ordinary customary international law; varying views had been expressed by members in that regard. Even among those members who had ultimately voted in favour of draft article 7, a majority had not made the claim that it expressed a rule of customary international law. The Special Rapporteur herself had spoken only of a "trend" to that effect. It was puzzling that a norm that a majority of the Commission did not recognize as a rule of simple customary international law, could be characterized, just one year later, as being the effect of a norm of *jus cogens*.

During the debate in the Sixth Committee on draft article 7 of the topic of immunity of State officials from foreign criminal jurisdiction, the Member States that had made statements had been evenly split on the question of whether or not draft article 7 (1) reflected customary international law. More importantly, only 5 States had more or less clearly expressed the view that draft article 7, paragraph 1, reflected customary international law, whereas 16 States had more or less clearly expressed the view that draft article 7, paragraph 1, did not reflect customary international law. In his view, the third report on the current topic was attempting to reopen the debate in an inappropriate context. Under the circumstances, he failed to see how it could be asserted, at the current stage, that the proposition contained in draft conclusion 23 (2) was a norm of *jus cogens*, or the effect of a rule of *jus cogens*.

The question of how to deal with draft conclusions 22 and 23 on the current topic was not one that should divide the Commission along the same lines as draft article 7 of the topic of the immunity of State officials from foreign criminal jurisdiction. Those colleagues who had voted in favour of that draft article 7 should not simply take draft conclusions 22 and 23 on the current topic as an opportunity to reaffirm their positions on draft article 7. Such an approach would be based on a misunderstanding: although that draft article resembled draft conclusions 22 and 23, there was a crucial difference in whether a rule was an effect of a *jus cogens* norm, or simply a rule of ordinary customary international law — or even a proposal *de lege ferenda*. In addition, draft article 23 (2), if adopted, would not include the procedural safeguards that the Commission would have to discuss in the framework of the topic of immunity of State officials from foreign criminal jurisdiction. For many members, the question of procedural safeguards was inextricably connected with draft article 7 as provisionally adopted. Draft conclusion 23 (2) would close the door to any possibility of arriving at a consensual approach regarding draft article 7 on the topic of immunity of State officials from foreign criminal jurisdiction. He was, moreover, concerned that the Special Rapporteur, in proposing two draft conclusions whose content was more specifically addressed in the context of other topics already on the Commission's agenda, had not addressed the concern that those draft conclusions could interfere with the Commission's consideration of those other topics. Failure to do so risked aggravating an already difficult situation.

On the substance, he failed to see how draft conclusion 23 (2) could be an effect of *jus cogens*. The International Court of Justice had stated in general terms that substantive norms of *jus cogens*, such as the prohibitions of international crimes, on the one hand, and rules on immunity — which were procedural in character — on the other, were two sets of rules that addressed different matters. Draft conclusion 23 (2) therefore directly contradicted the Court's case law since its judgments in the cases concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* and the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Moreover, if the

Commission were to consider adopting draft conclusion 23 (2), it would have to explain why the envisaged effect of the *jus cogens* prohibitions of international crimes would be limited to establishing an exception to immunity *ratione materiae*, and why they should not also extend to immunity *ratione personae*.

For the aforementioned reasons, he was opposed to referring draft conclusions 22 and 23 to the Drafting Committee. That did not mean the Commission could not take up the draft conclusions at a later stage, if the Commission decided that it should elaborate an illustrative list of specific rules of *jus cogens* and once definitive conclusions had been reached in the context of the topics of immunity of State officials from foreign criminal jurisdiction and of crimes against humanity. He was in favour of sending all the other proposed draft conclusions to the Drafting Committee.

Regarding methods of work, he recalled that the proposed draft conclusions contained in the Special Rapporteur's first report on the current topic had been referred to the Drafting Committee, which had provisionally adopted them. However, those draft conclusions had been left pending in the Drafting Committee. The Commission as a whole had been informed of the Drafting Committee's work through an interim report issued by the latter's Chair, a report that had been published, not very prominently, on the Commission's website. That same procedure had been repeated in 2017 with the second report, and he understood that it would be so again with the Special Rapporteur's third report. The Drafting Committee did not refer its work back to the Commission for its consideration in plenary meeting, which in turn meant that no commentaries were produced that the Commission as a whole and States could consider until the first reading of the draft conclusions. That was a serious problem, in that Member States could not properly follow the Commission's work on the topic and could not comment meaningfully in such cases. Member States were able to access a mere summary of the debate and the interim reports of the Drafting Committee Chair, which were not included in the Commission's annual report to the General Assembly and had not been discussed by the Commission in plenary meeting. Proceeding in such a way raised two major problems. First, the authority of the Commission's work rested on its procedure and on its transparent interaction with Member States, as represented in the Sixth Committee. It might under certain circumstances be acceptable to postpone the elaboration of commentaries and the adoption by the Commission as a whole of provisionally adopted draft conclusions until the following session; however, such exceptions should not become the rule.

Secondly, the response by States to the Commission's work was often limited. The Special Rapporteur himself had, in a different context, suggested that that might be attributable in part to the lack of resources by a number of States to digest the Commission's work within the available time frame. If the Commission did not express its considered view on the progress made at each session, and if it presented the results of its work over several years by presenting a single large set of commentaries to an entire set of draft conclusions, it would be impossible for many States, especially developing States, to take a meaningful position on the Commission's work.

He was aware that the way in which the Commission had proceeded with the topic of identification of customary international law had set a certain precedent for the method that seemed to be envisaged for the topic currently under discussion. The difference between the two situations, however, was that the draft conclusions on the topic of identification of customary international law had been dealt with essentially over two sessions — in 2014 and 2015 — and that the consideration of the topic in 2014 had taken place at such a late stage in the session that it had been impossible to prepare commentaries. For the current topic, the Drafting Committee was already in its third year of work, yet had produced no output in a form on which States could confidently comment on.

In raising such concerns, he did not mean to suggest that the Special Rapporteur or the Commission were consciously disregarding important aspects of established procedures; rather, it seemed that they were, almost unconsciously, slowly and nearly imperceptibly changing the Commission's working methods. While the Special Rapporteur no doubt had understandable concerns of efficiency, he wished to note that such an approach entailed serious costs for the legitimacy and transparency of the Commission's work and for the ability of States to respond meaningfully to the work. Such a question of procedure was not

one that could simply be delegated to the Working Group on methods of work; the Commission had a usual method of work and, if it wished to change it, it should do so only on the basis of a conscious, well-considered decision.

Mr. Ruda Santolaria, welcoming the Special Rapporteur's excellent, well-documented third report, said that he wished to address certain specific aspects raised therein. First, there was a clear distinction between the nullity *ab initio* of a treaty that, at the time of its conclusion, conflicted with a peremptory norm of general international law, as provided for in article 53 of the 1969 Vienna Convention on the Law of Treaties, and the situation covered by article 64 thereof, under which the emergence of a new peremptory norm of general international law caused an existing treaty that was in conflict with that norm to become void and terminate. In that regard, he agreed with the Special Rapporteur that the provisions of a treaty that were inconsistent with a new peremptory norm of international law should be considered to be separable from other, properly severable provisions and that the rest of the treaty should be regarded as still valid.

In respect of the possibility of formulating reservations to *jus cogens* norms, reference could usefully be made to paragraph 8 of general comment No. 24 of the Human Rights Committee on issues relating to reservations made upon ratification or accession to the International Covenant on Civil and Political Rights and its Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant (CCPR/C/21/Rev.1/Add.6), which stated that reservations that offended peremptory norms would not be compatible with the object and purpose of the Covenant.

He fully agreed with the relevance of the reference to the articles on responsibility of States for internationally wrongful acts, notably in respect of a serious breach of an obligation arising under a peremptory norm of general international law and the duty of States not to recognize as lawful a situation created by a serious breach, which stemmed from the Stimson doctrine of non-recognition of situations created as a result of an act of aggression, as in the case of the puppet state of Manchukuo, the creation of which had violated the sovereignty and integrity of China.

He also agreed with the emphasis placed by the Special Rapporteur on the duty to cooperate to bring an end through lawful means to serious breaches of peremptory norms and the useful reference to the 2006 judgment of the Inter-American Court of Human Rights in the *Case of La Cantuta v. Peru*. That was fully compatible with the Special Rapporteur's assertion that such norms established obligations *erga omnes*, the breach of which concerned all States. At the same time, the consequences of non-recognition should not negatively affect or disadvantage the civilian population in areas such as the registration of births, deaths and marriages, as stated by the International Court of Justice in its 1971 advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.

Regarding the effects of *jus cogens* norms in respect of immunity, he underlined the distinction between immunity, which was of a procedural nature, and the irrelevance of official capacity, which had substantive effect, as provided for in article IV of the Convention on the Prevention and Punishment of the Crime of Genocide and article 27 of the Rome Statute of the International Criminal Court. He agreed that current law did not allow exceptions to immunity *ratione personae* based on the *jus cogens* nature of the crime concerned. The reasoning of the Supreme Court of Appeal of South Africa in its judgment in case No. 867/15 concerning the arrest warrant for President Al-Bashir of Sudan was of particular interest in that it made a distinction between the situation of a State party to the Rome Statute, which had accepted the implications of article 27 on immunity, and a non-State party, in which case the removal of immunity for the Sudanese president would be based on United Nations Security Council resolution 1593 (2005).

The real question was therefore whether *jus cogens* crimes excluded the applicability of immunity *ratione materiae*. His position was more nuanced than that of the Special Rapporteur, who considered that such immunity did not apply to any offence prohibited by a *jus cogens* norm. First, any overlap with the topic "Immunity of State officials from foreign criminal jurisdiction" should be avoided. He considered that draft article 7 on the

topic, approved by the Commission by majority the previous year, which listed the crimes under international law in respect of which immunity *ratione materiae* should not apply and, in an annex to the draft articles, the international instruments in which they were defined, reflected an appropriate balance in the developing trend towards not granting immunity from jurisdiction *ratione materiae* when doing so might lead in practice to situations of impunity for horrendous crimes repugnant to human conscience.

He supported the Special Rapporteur's statement that, subject to the application of article 66 of the 1969 Vienna Convention, the fact that a dispute involved a peremptory norm of general international law was not sufficient to establish the jurisdiction of the International Court of Justice without the necessary consent to jurisdiction in accordance with international law.

He also agreed with the idea that the hierarchical superiority of *jus cogens* norms was applicable both to customary international law, whether general or specific, and to unilateral acts. He believed it was consistent to state that a customary international law rule did not emerge if it conflicted with a peremptory norm of international law and that a customary international law rule not of *jus cogens* character ceased to exist if a new conflicting peremptory norm of general international law arose. At the same time, in accordance with customary international law, since peremptory norms of general international law were binding on all subjects of international law, the persistent objector doctrine did not apply.

The Special Rapporteur's reasoning whereby it would make little sense if States were precluded from assuming obligations in conflict with *jus cogens* through treaties, but permitted to assume those same obligations through unilateral acts was logical. As reservations to treaties were unilateral acts, it would be useful to refer to guideline 4.4.3 of the Guide to Practice on Reservations to Treaties, which stated that a reservation to a treaty provision which reflected a peremptory norm of general international law did not affect the binding nature of that norm, which should continue to apply as such between the reserving State or organization and other States or international organizations, and a reservation could not exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Regarding Security Council resolutions, he agreed that, as in the case of treaties, their compatibility or conformity with *jus cogens* norms should be determined. However, in the hypothetical case of incompatibility between a resolution and a peremptory norm, the latter should prevail.

Lastly, subject to what he had stated regarding immunity *ratione materiae* when considering draft conclusion 23 (2), he agreed with the proposed draft conclusions. Accordingly, he supported the referral of the draft conclusions to the Drafting Committee.

Mr. Murphy said that he would welcome clarification of Mr. Ruda Santolaria's views on immunity *ratione materiae* and whether he supported draft conclusion 23.

Mr. Ruda Santolaria said that he agreed with the draft conclusions in general but, in respect of immunity *ratione materiae* under draft conclusion 23, he was concerned that any overlap with immunity of State officials from foreign criminal jurisdiction should be avoided. The form that had been agreed during the previous year's discussion on draft article 7 should be retained, as Mr. Nolte had suggested. It had been agreed then that some elements were *lex lata* and others *lex ferenda*, and a trend could be seen to be appearing from the wording of draft article 7 and that of draft conclusion 23 of exceptions being recognized for a number of crimes, as defined in the international instruments specified. He was thus advising caution, with a view to preserving the balance that had been achieved the previous year.

Ms. Lehto said that she wished to commend the Special Rapporteur for his excellent third report, the subject of which was the most difficult and challenging part of the concept of *jus cogens* and an area that had not been elaborated upon extensively by the international courts and tribunals. As for the literature, the question of the effects of *jus cogens* had been the subject of conflicting, and some fairly eccentric, views. Against that background, she

welcomed the Special Rapporteur's careful analysis, notably of those potential consequences of *jus cogens* that were most often referred to in practice.

The consideration of treaty law in paragraphs 30 to 76 of the report built for the most part on the Vienna Convention on the Law of Treaties and the Commission's work preceding it. While it was worth noting that a treaty could be invalidated only as a result of conflict with a peremptory norm in accordance with the procedure laid out in article 65 of the Vienna Convention, it was unnecessary to include the relevant procedural requirements in the draft conclusions, as Mr. Murphy had proposed; they could instead be reflected in the commentaries.

She supported the proposal in draft conclusion 14 (1) that States should make use of the procedure for dispute settlement provided in article 66 (a) of the Vienna Convention, and welcomed Mr. Nolte's comment concerning the customary nature of articles 65 and 66. The wording of the draft conclusion could be discussed in the Drafting Committee.

She noted the suggestion in paragraph 66 of the report and in draft conclusion 10 (3) that a treaty should, as far as possible, be interpreted in a way that rendered it consistent with a peremptory norm of general international law. The point had been welcomed by some colleagues as a helpful recommendation, while others had highlighted the potential conflict of such a recommendation with the provisions of the Vienna Convention concerning the invalidation of treaties, as well as the potential for abuse. As the Special Rapporteur had suggested, article 31 (3) (c) of the Vienna Convention could be taken as the basis for that principle, which had been endorsed in the work of the Commission and the jurisprudence of international courts. In the judgment of the European Court of Justice in the *Front Polisario* case, the Court had interpreted the Association Agreement and Liberalization Agreement between the European Union and Morocco as being consistent with the right of self-determination, thus setting aside the decision of the General Court to invalidate the treaties. The European Court of Justice had come to the same conclusion in the *Western Sahara Campaign UK* case, in which the Grand Chamber had interpreted the Fisheries Agreement between the European Union and Morocco as being inapplicable to the waters adjacent to the territory of the Western Sahara and therefore compatible with the right of self-determination, despite the Advocate General's opinion declaring the Agreement null and void. Those judgments thus lent support to the interpretative rule reflected in draft conclusion 10 (3). At the same time, the question arose as to whether that reduced the force of article 53 of the Vienna Convention. She did not object to the proposed draft conclusion but it would be useful in the commentary to attempt to explain how the words "as far as possible" were to be understood.

Draft conclusion 13, on reservations to treaties, reflected the essential content of guideline 4.4.3 of the Guide to Practice on Reservations to Treaties. Regarding draft conclusion 15, on customary international law, she welcomed the clear statement in paragraph 3 that the persistent objector rule was not applicable to *jus cogens* norms, as had been noted in the context of the topic "Identification of customary international law". In draft conclusion 16, on unilateral acts, it would be useful to add some detail, for example the insertion of the words "of States" after "unilateral acts".

In respect of draft conclusion 17, while binding resolutions of the United Nations Security Council were obviously relevant in that context, she agreed with Mr. Murphy that other international organizations with competence to take binding decisions should not be excluded. The use of the term "resolutions" might be too restrictive and could be reconsidered by the Drafting Committee. The wording of draft conclusion 18 addressed the relationship and overlap between obligations *erga omnes* and peremptory norms quite elegantly, but she would be prepared to consider other drafting proposals.

On State responsibility, the Special Rapporteur had relied on the Commission's earlier work and taken account of relevant case law, but, in draft conclusion 21, had departed from article 41 (2) of the articles on responsibility of States for internationally wrongful acts in not qualifying the breach as "serious". The examples mentioned in paragraphs 96 to 101 of the report mostly seemed to meet that description, but the Special Rapporteur explained that the authorities concerned, including the International Court of

Justice, had not required such a qualifier. She could accept the proposal but considered that a departure from the articles on State responsibility should be explained in the commentary.

She agreed with Mr. Park that the limits set by peremptory norms on the use of countermeasures could also be addressed in the draft conclusions, since the 2001 articles on State responsibility did so. Unless the Special Rapporteur intended to limit the scope of draft conclusion 16 to unilateral declarations creating legal effects — a question that had been raised by Mr. Murphy and Mr. Nolte — countermeasures could be referred to in a separate guideline or as a category of unilateral acts.

As Mr. Nguyen and Mr. Murphy had suggested, the responsibility of international organizations should also be addressed. While peremptory norms had been addressed in a "without prejudice" clause in the 2011 articles on the responsibility of international organizations, article 26 thereof made it clear that international organizations could not invoke a circumstance precluding wrongfulness in the case of non-compliance with peremptory norms. The inclusion of international organizations would also be in line with the Commission's work on other current topics, such as "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

On the effects of peremptory norms on individual criminal responsibility, immunity and jurisdiction, she did not share the view that those topics would be an arbitrary choice, but saw them as following from the stated aim of focusing on the most frequently identified potential consequences of *jus cogens*.

Regarding establishment of jurisdiction, addressed in draft conclusion 22, she noted the view of the Special Rapporteur set out in paragraph 117 of the report that the existing "substantial practice" formed "a strong basis for the evolution of" a duty to prosecute crimes the prohibition of which constituted a *jus cogens* norm. She agreed that the number of States with domestic legislation providing jurisdiction for genocide, crimes against humanity or war crimes was substantial, given that, even in the case of binding obligations, implementation at the national level remained a challenge.

On immunity, the focus of draft conclusion 23 (2), she agreed with the Special Rapporteur that the real issue was whether *jus cogens* crimes excluded the applicability of immunity *ratione materiae* and that practice related to criminal responsibility — and not civil proceedings — must form the basis of any international law rule relating to exceptions to immunity on account of *jus cogens* crimes. It was also relevant in that respect that the judgment of the International Court of Justice in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* specifically excluded cases of persons who no longer held office. She believed that the purpose of immunity *ratione materiae* was to protect official acts rather than persons who had held an official position.

In conclusion, the legal analysis given in paragraphs 121 to 129 was both sound and convincing. At the same time, it was clear that draft conclusion 23 (2) was closely related to the topic "Immunity of State officials from foreign criminal jurisdiction" and to draft article 7 adopted by the Commission the previous year. Account should therefore be taken of the framework that had — and was being — developed in the context of that topic as far as the list of crimes and delimitations were concerned. Similarly, any procedural safeguards that might be agreed in that context would be relevant for draft conclusion 23 (2) as well. However, it should be noted that draft conclusion 23 (2) stated only a general rule, while the topic of immunity specifically addressed the rules and procedures related to the immunity of State officials from foreign criminal jurisdiction. There was no need to repeat those specifications in the draft conclusions but they could be explained in as much detail as necessary in the commentary. Draft conclusion 23 (2) should not be considered as an attempt to create new rules on immunity; rather, there should be coordination between the two topics so as to send a coherent message to States. She believed that a pragmatic way would be found to accommodate the slight overlap between those topics. Any useful coordination with the topic "Crimes against humanity" should also be encouraged.

In conclusion, she supported sending all 13 draft conclusions to the Drafting Committee.

The meeting rose at 6 p.m.

Provisional

For participants only
25 July 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3418th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 3 July 2018, at 10 a.m.

Contents

Peremptory norms of general international law (*jus cogens*) (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (**A/CN.4/714** and **A/CN.4/714/Corr.1**)

The Chair invited the Commission to resume its consideration of the third report of the Special Rapporteur on peremptory norms of general international law (*jus cogens*).

Mr. Rajput said that he wished to congratulate the Special Rapporteur on his excellent third report, which drew upon both theory and practice and represented an attempt to address a complex area of international law. Care should be taken, however, to ensure that the increased importance of *jus cogens* norms in modern times did not disturb the balance of treaty relations. In his view, while some of the draft conclusions proposed in the report maintained that balance, others did not.

With regard to procedure, the Commission should endeavour to make its work on the topic of peremptory norms of general international law accessible to States, even while it was in progress, in accordance with the practice followed for other topics. If a topic was considered towards the end of the second part of the session, the commentaries should be presented and adopted the following year at the latest. No exception should be made for the topic at hand on the grounds that it had to be addressed in the Working Group on working methods.

As for the distinction between the words "invalid" and "void" in relation to treaties that conflicted with peremptory norms, he noted that, in the 1969 Vienna Convention on the Law of Treaties, the word "invalid" seemed to be used in a manner similar to the word "voidable" in common law jurisdictions, namely to describe imperfections that the parties could waive or correct in order to preserve a treaty. The word "void", however, was used in the 1969 Vienna Convention to refer to an error in a treaty that could not be corrected and thus rendered the treaty unworkable. For example, a treaty that was procured by the threat or use of force was void under article 52 and a treaty that conflicted with a peremptory norm was void under articles 53 and 64. However, the word "invalidity" had been used as a generic term in the titles to the relevant part and section of the 1969 Vienna Convention, and article 71 used the word "invalidity" in its title and the word "void" in the text. Thus, the word "invalid" could be used in a title, and the word "void" could be used in the text in order to ensure consistency with the 1969 Vienna Convention.

Turning to the draft conclusions themselves, he agreed with draft conclusion 10 (1) and (2). However, although he agreed with the overall objective of avoiding conflicts between peremptory norms and interpretations of treaties, he was uncomfortable with the current text of draft conclusion 10 (3), as it risked giving the impression that, even when there was no inconsistency between the interpretation of a treaty and peremptory norms, and the treaty operated independently of the scope of peremptory norms, it was nevertheless preferable that the treaty should be interpreted in a manner consistent with such a norm. His argument might seem overly cautious, but it was important to preclude any interpretation of the draft conclusions that could upset the negotiated outcome of a treaty in force.

With regard to draft conclusion 11, the Special Rapporteur had diligently followed the outcome of the Commission's work on severability in the context of the law of treaties. As reflected in its commentaries to the draft articles on the law of treaties, the Commission had taken the view that the very fact of entering into a treaty contrary to peremptory norms was unconscionable. However, he (Mr. Rajput) was not convinced by the Commission's reasoning on that point. It was possible to envisage a treaty that dealt with a range of subjects, only one of which conflicted with a pre-existing peremptory norm. In addition, such conflicts would be identified at the interpretation stage. There was no need to presume that every treaty found to be in conflict with a pre-existing peremptory norm had necessarily been entered into in the knowledge that it was in conflict with that norm. However, despite those reservations, he did not think that the position adopted by the Commission and subsequently by States in the 1969 Vienna Convention should be changed, as it was necessary for consistency and stability. He therefore supported draft conclusion 11.

He agreed with draft conclusion 12. However, a new paragraph could be inserted between its two constituent paragraphs in order to reflect States' obligation under article 71 (1) (b) of the 1969 Vienna Convention to bring their mutual relations into conformity with a peremptory norm of general international law if a treaty was void because it conflicted with the norm in question, as that obligation was currently not reflected in draft conclusions 10 to 13.

He agreed with draft conclusion 13.

With regard to draft conclusion 14, he wondered whether a provision on dispute resolution was necessary, as the purpose of the Commission's work on the topic was to clarify the situation of the law as it existed rather than to produce a draft convention. As article 66 (a) of the 1969 Vienna Convention already provided for a dispute settlement procedure, the recommendation contained in the draft conclusion was in effect intended for States that had entered a reservation to the relevant provisions of that instrument or were not parties to it. In his view, States did not need a recommendation from the Commission on the ways in which they should resolve disputes arising from peremptory norms. It was ultimately for States to select the appropriate dispute resolution procedure, as there was no hierarchy *per se* among the various methods mentioned in Article 33 of the Charter of the United Nations. His preference would be to omit the provision in question from the draft conclusions.

He agreed with the Special Rapporteur's decision to expand his analysis of the relationship between peremptory norms and treaties to include other sources of international law. However, such an approach should be taken with caution. The report included a discussion of the relationship between peremptory norms and customary law, unilateral acts and resolutions of international organizations, including the Security Council, but the relationship between peremptory norms and general principles of law should also be considered. According to draft conclusion 5 (3), general principles of law could form the basis of peremptory norms. However, the discussion of general principles as a source of peremptory norms in the absence of a discussion of the effect of peremptory norms on general principles created an anomaly. As conflicts between treaties and peremptory norms were dealt with in the 1969 Vienna Convention, the absence of a reference to general principles gave the impression that customs had been singled out.

Although the inclusion of a general proposition on the hierarchical superiority of peremptory norms over customary norms was understandable, it was necessary to clarify the relationship between the two. A middle ground should be sought between the Special Rapporteur's argument that a customary norm that conflicted with a peremptory norm always had to be set aside and the opposing argument that a conflict between *jus cogens* and customary international law was not possible. The Special Rapporteur's reasoning was based on an analogy between customs and treaties. Although the negotiation of a treaty could be a long process, the obligations that it set out were created instantaneously: it was harder to identify the precise moment at which a custom was created. In addition, as noted in draft conclusion 5 (2), customary law was a prominent source for the creation of peremptory norms. If it was not possible for a customary norm to emerge contrary to a peremptory norm, a new peremptory norm that contradicted or altered an existing peremptory norm would never arise. The absolute negation of the possible emergence of a customary international law rule that conflicted with a peremptory norm, as proposed in draft conclusion 15 (1), created practical problems. In addition, the decisions of domestic and regional courts cited in paragraph 140 of the report to demonstrate the hierarchical superiority of peremptory norms were limited to situations of conflict between existing norms of customary law and peremptory norms and did not relate to peremptory norms that might arise in the future. The possibility that customary norms might develop contrary to peremptory norms should be left open in order not to stifle the development of peremptory norms. For that reason, he did not support the inclusion of draft conclusion 15 (1). However, he agreed with draft conclusion 15 (2).

The persistent objector rule was a related point. There were two temporal phases to the creation of a peremptory norm via customary law: a norm first had to become part of customary law before it could eventually become a peremptory norm. The persistent objector rule would continue to apply until the second of those two stages had been

completed. However, it was not clear whether draft conclusion 15 (3) took that reality into account. It should be made clear that the persistent objector rule would cease to apply only once a peremptory norm had been created. He agreed with the Special Rapporteur's position, as set out in draft conclusion 7 (3), that a persistent objector could not prevent a norm from being identified as a peremptory norm if it had been accepted by a large majority of States.

Despite the lack of practice relating to the relationship between peremptory norms and unilateral declarations, he agreed with the text of draft conclusion 16 for the reasons given in the report.

He understood that there was a trend in legal scholarship that supported the Special Rapporteur's position regarding the relationship between peremptory norms and binding resolutions of international organizations. Although it could in principle be agreed that States would not be bound by a resolution that called for or perpetuated a breach of a peremptory norm — say, a Security Council resolution calling for the commission of genocide — the expression of doubts about such institutions might in practice have unintended consequences. Non-intervention and respect for sovereign equality were pillars of international relations and could safely be argued to be of the nature of peremptory norms. In his view, the Commission should refrain from expressing a position on such matters, which should be dealt with on a case-by-case basis. For that reason, he did not see the need for draft conclusion 17.

Turning to draft conclusions 18 to 21, although he agreed with the Special Rapporteur that it was necessary to consider the relationship between State responsibility and peremptory norms, he found that the draft conclusions did not fully take into account the structure, content and purport of the articles on responsibility of States for internationally wrongful acts in relation to peremptory norms. Draft conclusion 18 was the clearest example in that regard.

The Special Rapporteur suggested in the report and in draft conclusion 18 that peremptory norms established obligations *erga omnes*. However, articles 40 and 41 of the articles on State responsibility stipulated that only serious breaches of obligations arising under peremptory norms gave rise to *erga omnes* obligations. *Erga omnes* obligations that had no connection with peremptory norms and obligations *erga omnes partes* were dealt with separately under article 48 of the articles on State responsibility.

In the context of the articles on State responsibility, the Commission's decision that only serious breaches of peremptory norms should be treated as giving rise to *erga omnes* obligations had been the outcome of a compromise reached in an open-ended working group and subsequently in the Drafting Committee. In paragraph (7) of its introductory commentary to chapter III of the articles on State responsibility, the Commission had noted that, although there was a substantial overlap between peremptory norms and *erga omnes* obligations, they were not the same and had thus been treated separately. There had been practical reasons for that decision, namely the danger that any provision to the contrary could be misused. Chapter II of part III of the articles on State responsibility provided for a range of countermeasures that could be taken in response to a single breach of a peremptory norm. The fact that more than one State would be able to take action in such situations would result in consequences that were not commensurate with the injury caused.

If all *jus cogens* norms were deemed to establish *erga omnes* obligations, even a single instance of torture in a State that was a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment would give other States the right to take countermeasures against it. Other States that did not enjoy cordial relations with that State would be able to take retaliatory measures against it without having suffered any injury at all. A "gross and systematic" practice of torture would constitute a serious breach of a peremptory norm, which would give rise to an *erga omnes* obligation. Torture was an important example for other reasons. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice had held that the Convention against Torture created an obligation *erga omnes partes*, or an obligation for its States parties only. Article 5 of the Convention required a State party to establish its jurisdiction over relevant offences if they had been committed in a territory under its

jurisdiction, if the alleged offender was one of its nationals or if the alleged offender was present in a territory under its jurisdiction. However, if a single instance of torture in a given State was deemed to give rise to an *erga omnes* obligation, all States could take measures against that State irrespective of the provisions of article 5. In effect, the Special Rapporteur's proposal would rewrite the law and impose obligations on States higher than those already provided for in treaties that related specifically to the protection of peremptory norms. For that reason, draft conclusion 18 should be limited to serious breaches of peremptory norms.

He agreed with draft conclusion 19, as proposed.

Draft articles 40 and 41, on State responsibility, had a substantive and a procedural element. The procedural part, which formed the basis of draft conclusions 20 and 21, related to the procedure for redress in the event of serious breaches of peremptory norms. Draft conclusion 20 (1), which was based on draft article 41 (1), captured the idea that there was a duty to cooperate in order to bring serious breaches of peremptory norms to an end. Paragraph 2 of that draft conclusion, which was based on draft article 40 (2), was an attempt by the Special Rapporteur progressively to develop cooperation through institutions, or in an *ad hoc* manner, and constituted a welcome step forward from the draft articles on State responsibility.

While draft conclusion 20 expressly referred to serious breaches of peremptory norms, draft conclusion 21, which was based on draft article 41 (2) of the draft articles on State responsibility, failed to do so. Paragraph 100 of the report claimed that the duty imposed by the latter draft article was absolute. The commentary, text and title of that draft article clearly connected it to serious breaches of peremptory norms, whereas draft conclusion 21 did not specify that the duty to which it referred applied only to serious breaches of peremptory norms. Paragraph 95 of the report asserted that the obligations under draft article 41 (2) were already *lex lata*, yet the cases cited in paragraphs 96 to 99 of the report did not support the proposition that there was a general rule on the duty to cooperate to end every breach of a peremptory norm.

He disagreed with the description in paragraph 96 of the report of the findings in the advisory opinion of the International Court of Justice in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*. While he could sympathize with a desire to regard peremptory norms as central to those findings, the opinion did not mention them and the reference to *erga omnes* obligations in paragraph 126 of the opinion suggested that what the Court had in mind were in fact *erga omnes partes* obligations. In paragraph 97 of his report, the Special Rapporteur referred to the advisory opinion of the Court in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, but once again the Court appeared to have been more concerned with the relationship between *erga omnes* obligations and *jus cogens*, because the norm in question was an *erga omnes* obligation which itself imposed a duty on States to cooperate. If draft conclusion 21 was adopted without the insertion of the word "serious" before "breach", it would be inconsistent with the draft articles on State responsibility. It should therefore be revised accordingly.

He disagreed with draft conclusions 22 and 23, which were interlinked. There was no obligation in customary international law on States to exercise jurisdiction in the manner proposed by the Special Rapporteur in draft conclusion 22. In situations where States had undertaken to exercise jurisdiction over offences prohibited by peremptory norms, that duty had flowed from the express provisions of a treaty, a good example being *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, where the House of Lords of the United Kingdom had found that its jurisdiction was restricted to offences committed after the entry into force in the United Kingdom of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Draft conclusion 23 excluded the immunity *ratione materiae* of a person holding an official position, despite the fact that draft article 1 (2) on the immunity of State officials from foreign criminal jurisdiction acknowledged the immunity of diplomats and other officials under special rules of international law. He was in fact astonished to find a provision on immunity in the draft articles on the topic under consideration and, in that connection, referred to the statement he had made on the subject of immunity at the previous session of

the Commission. Any attempt to capitalize on the divided opinion which had emerged on that matter would discredit the topic of *jus cogens* and damage collegiality within the Commission.

With regard to future work, any indicative list of *jus cogens* norms would have to be supported by sufficient material demonstrating that each rule that was allegedly a peremptory norm satisfied all the provisions which had been adopted so far on the creation and identification of peremptory norms, a process that could last for decades.

Mr. Hmoud said that certain *erga omens* obligations derived from the peremptory norm of self-determination, which had been one of the issues at stake in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Mr. Rajput said that self-determination was both a peremptory norm and an *erga omnes* obligation. All such obligations were, by their very nature, covered by draft article 48 of the draft articles on State responsibility, which gave rights to other States. However, not all peremptory norms were also *erga omnes* obligations; those which were not would have the consequences identified in the above-mentioned draft articles only in the event of a serious breach of those norms. The provisions of draft articles 40 and 41 on State responsibility therefore functioned independently of draft article 48. For that reason, while self-determination was itself both a peremptory norm and an *erga omnes* obligation, the wording of the text required very careful consideration; otherwise it might be assumed that the level of the breach entailing consequences had been lowered in respect of other *erga omnes* obligations which were not peremptory norms. Lastly, he wished to clarify that draft conclusions 22 and 23 should not be referred to the Drafting Committee.

Mr. Hmoud said that when serious breaches of the peremptory norm of self-determination occurred, they triggered consequences under draft articles 40 and 41 on State responsibility and the international community had a collective interest in the enforcement of that norm.

Mr. Šturma said that the right to self-determination and the prohibition of genocide and torture were peremptory norms giving rise to *erga omnes* obligations under the primary rules of international law. The position might, however, be different under secondary rules on State responsibility. Hence a violation of the prohibition of torture had to be systematic in order to set in motion the legal consequences stemming from an internationally wrongful act.

Mr. Grossman Guiloff said that it would be wise for the Commission to examine whether, in some circumstances, a single violation of a peremptory rule might amount to a systematic violation thereof.

Mr. Jalloh said that the Special Rapporteur's third report was particularly valuable in that it dealt with the legal consequences of *jus cogens* in several substantive areas of international law and proposed 14 new draft conclusions. He agreed with the practical approach outlined in paragraphs 21 and 22 of the report. He also concurred with the Special Rapporteur that it was not the Commission's task to choose between the "narrow" or "broad" approaches which had formed the subject of much scholarly debate, and that it would be safer to address the potential consequences of *jus cogens* norms in the fields where they had been most frequently identified. He was pleased to note that the third report was firmly rooted in the Commission's earlier work, since that would further the stability of the international order, ensure institutional continuity and legitimacy and promote the draft conclusions' acceptability to States.

He generally agreed with the substance and wording of draft conclusion 10, which was based on a combination of articles 53 and 64 of the 1969 Vienna Convention. He had no objection to the helpful clarification that, in accordance with the Convention, treaties which were void because they conflicted with peremptory norms of general international law did not create any rights or obligations for States. He had some limited reservations about stating that parties were released from any further obligation to perform when existing treaties became void and terminated owing to a conflict with a new *jus cogens* norm that emerged after a treaty's conclusion. He was, however, concerned that the Commission was potentially offering States a pretext unilaterally to denounce treaty

obligations on the grounds that they violated *jus cogens* norms that were not independently verified or verifiable by third parties.

Although the Special Rapporteur's focus on treaties was understandable, since draft conclusion 10 was based on the 1969 Vienna Convention, he tended to agree with Mr. Park that the theoretical and practical implications of justifying the proposed text by the *pacta sunt servanda* principle had not been fully reconciled. Even though the good faith principle was embodied in article 26 of the 1969 Vienna Convention and Article 2 (2) of the Charter of the United Nations, he doubted whether it warranted a strong interpretative rule on a *jus cogens* norm. In point of fact, as far as the aforementioned article 26 was concerned, he wondered how, if a treaty was void within the meaning of article 53 of the Convention because it conflicted with *jus cogens* at the time of its conclusion, it could be in force for the parties to it, thereby requiring them to perform the obligations under it in good faith and to interpret the treaty in accordance with articles 31 and 32 of the Convention.

He agreed with Mr. Nolte that, in principle, there was no reason why the rule of interpretation set forth in draft conclusion 10 (3) could not be broadened to apply to other rules of customary international law and, perhaps, even other sources of obligations addressed in other draft conclusions. Perhaps that paragraph would be more appropriately located in a different draft conclusion dealing specifically with that issue.

He had no substantive concerns with regard to draft conclusion 11, since it was based on article 44 (3) of the 1969 Vienna Convention. He supported Mr. Murphy's suggestions with regard to the structuring of draft conclusions 10 and 11, provided that the Special Rapporteur and the Drafting Committee were also in favour of them.

He agreed with the overall thrust of draft conclusion 12, but if the Drafting Committee decided to retain it as it stood, in order to avoid any confusion, the commentary should explain why the Commission had decided to depart slightly from the wording of article 71 of the 1969 Vienna Convention. There was, however, no need to refer to provisions from articles 69 and 70 of the Convention: the draft conclusion had already been made strong enough by reinforcing elements of article 71.

Draft conclusion 13, which drew on guideline 4.4.3 from the Guide to Practice on Reservations to Treaties, concisely reflected the key points of the guideline. Nevertheless, it would be prudent to explain clearly in the commentary why it differed from the guideline.

The initial phrase in draft conclusion 14, "subject to the jurisdictional rules of the International Court of Justice", might obviate the potential risk of conflating any breach of *jus cogens* rules with automatic jurisdiction of the International Court of Justice, bearing in mind the fact that the Court had itself emphasized the importance of consent to its jurisdiction when it stated in *East Timor (Portugal v. Australia)* that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things". It might therefore be useful to make it plain in the commentary that a breach of *jus cogens* did not automatically mean that a State was subject to the Court's jurisdiction. The fundamental consent requirement embodied in the relevant provisions of the Charter of the United Nations ought to remain and when the draft conclusion was discussed in the Drafting Committee the latter should not go further than the Court was willing to go without a formal amendment of its Statute.

He fully agreed with the content of draft conclusion 15. If, however, paragraph 3, concerning the persistent objector rule, proved to be controversial, it might be wise to move it to the commentary. If the Drafting Committee decided to keep the paragraph, it would be advisable to elaborate more on why *jus cogens* norms were binding in order to eliminate any potential ambiguity.

While he had no objection to draft conclusion 16, he agreed with Mr. Murphy on the advisability of clarifying, either in the provision or in the commentary, what exactly was meant by "unilateral act".

Draft conclusion 17, which addressed the consequences of peremptory norms of general international law (*jus cogens*) for binding resolutions of international organizations, was an important one, especially as States continued to create more such organizations and delegate to them responsibilities in various fields of international law. He supported the

Special Rapporteur's decision to highlight the resolutions of the United Nations Security Council, given that the Council increasingly adopted binding resolutions on the basis of Chapter VII of the Charter of the United Nations that were often highly regarded and had profound legal consequence both for States and — when they related to human rights and the law of armed conflict — for individuals. It therefore made sense to him to include a direct reference to such resolutions rather than group them together with the resolutions of other bodies, particularly given the impact of the binding nature of such decisions under Article 25 of the Charter.

Article 103 of the Charter should not be interpreted to mean that resolutions that violated *jus cogens* norms should prevail. Indeed, as Judge Lauterpacht had found in his separate opinion in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, "the relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot — as a matter of simple hierarchy of norms — extend to a conflict between a Security Council resolution and *jus cogens*". The same point had been made by others, including the International Law Association in its third report on the accountability of international organizations.

The draft conclusion might be stronger if it was indicated that resolutions that violated *jus cogens* norms would not only no longer be binding, but would also be invalid, thus emphasizing that such resolutions should not be legitimized in any way. After all, the Security Council had adopted resolutions in the past in the knowledge that they violated a *jus cogens* norm, including resolutions 731 and 748 of 1992 on the Libyan Arab Jamhiriya. In those resolutions, the Council had supported threats made in a bilateral setting to the Libyan Government to extradite two suspects of the Lockerbie bombing or face the use of force, contrary to Article 2 (4) of the Charter, which prohibited the use or threat of force, even though the threats had not fallen within the scope of Article 51.

Although draft conclusion 18 was substantively on point, he recommended elaborating in the commentaries on what was meant by the phrase "concerns all States" so as to clarify whether States were expected to immediately take action and, if so, of what kind. He did not see any need to revise draft conclusion 19.

The Special Rapporteur's explanation of the differences between draft conclusions 20 and 21, namely that the former required States to take positive action while the latter required them to abstain from conduct, supported the use of the qualifier "serious" in draft conclusion 20 and not in draft conclusion 21. However, he would not object if the Drafting Committee decided to delete the word "serious" from draft conclusion 20. While he appreciated the Special Rapporteur's explanation of his reasoning, naturalism or positivism should not generally serve as the framework for the Commission's work, and he therefore welcomed the reliance on the authorities cited in paragraphs 96 to 101 of the report.

In its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the International Court of Justice had declared that States were "under obligation" to recognize the illegality of the conduct of South Africa. Draft conclusion 20 provided that: "States shall cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law (*jus cogens*)." Given that both "States shall" and States are "under obligation" reflected an obligatory intent, he did not see any reason to depart from the language used by the Court in both that advisory opinion and its opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

He strongly supported the substantive thrust of draft conclusion 22, as it might be important should the Commission wish to adopt universal jurisdiction as a topic in the future.

Regarding draft conclusion 23, which was inevitably controversial given that it dealt with the issue of immunity, he supported in principle the idea that violation of a *jus cogens* norm should not constitute a ground excluding criminal responsibility. His position on that issue was well known, and he had played a role in forging a compromise text when the

Commission had dealt with the issue at its previous session. That said, in view of the sensitive nature of the issue, he wondered whether it might not be wiser to revisit the matter at a later date in order to assuage the concerns of those members who had strongly opposed the adoption of draft article 7 on the immunity of State officials from foreign criminal jurisdiction.

Taking into account the debate in the plenary, he would be in favour of transmitting all the draft conclusions to the Drafting Committee.

Mr. Chahdi said that the Special Rapporteur's third report was concise and well structured and contained a wealth of references, despite the scarcity of practice in the area of peremptory norms of general international law. He wondered whether the Special Rapporteur had given any consideration to the possibility of compiling a selective bibliography to be annexed to the Commission's final output on the topic. The Special Rapporteur had opted for an analytical approach that focused on the consequences of *jus cogens* that had most often been identified. While that approach had resulted in a slightly lengthier report, it was appropriate given that *jus cogens*, which had its origins in treaty law, had spread from that field of law to others, such as international State responsibility. The concept of *jus cogens* was now well established in international law.

In treaty law, the consequences of *jus cogens* were severe, given that a treaty was void if, at the time of its conclusion, it conflicted with a peremptory norm of general international law, as stipulated in article 53 of the 1969 Vienna Convention. As the Special Rapporteur had noted, that consequence struck at the heart of a fundamental and foundational element of international law, namely *pacta sunt servanda*, and significantly limited the freedom to conclude treaties.

It seemed that it was the severity of the consequences that accounted for the Commission's reticence, in its 1966 draft articles on the law of treaties, to include any examples of *jus cogens* norms in draft article 50, which later became article 53 of the 1969 Vienna Convention. The Special Rapporteur's argument in paragraph 41, in relation to article 71 of the Convention, that it might not be possible to undo all the consequences of acts performed in reliance on a treaty provision that was in conflict with a *jus cogens* norm was an interesting one, but should have been backed it up with some practical examples.

The Special Rapporteur recalled that, under article 64 of the 1969 Vienna Convention, the emergence of a new rule of *jus cogens* was not to have retroactive effects on the validity of a treaty. He also addressed other problems such as the severability of treaty provisions in conflict with a *jus cogens* norm in the context of articles 64 and 44 of the 1969 Vienna Convention. On that basis, he had proposed draft conclusion 11, which in the speaker's view was interesting and quite satisfactory. The Special Rapporteur could have elaborated further on the term "conflict", which he addressed only briefly in paragraph 35, noting that not much attention had been paid to it in the literature.

Concerning the effects of *jus cogens* on the interpretation of treaties, the Special Rapporteur put forward an interesting proposition in paragraph 68 of the report, namely that "a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*)". To support that proposition, the Special Rapporteur cited the Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom, which was in fact the 1960 treaty on the independence of Cyprus.

The statement in paragraph 62 of the report that "the Front Polisario successfully sought to have the Fisheries Partnership Agreement annulled" was incorrect: the judgment of the General Court of the European Union, which had been set aside on appeal by the Grand Chamber of the European Court of Justice, concerned the annulment of a decision of the Council of the European Union on the conclusion of an agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural and fishery products, and not the annulment of the agreement itself. In any case, he agreed with Mr. Park that the relevance of the case to the report was not clear.

Regarding the effects of *jus cogens* norms on reservations to treaties, he supported the Special Rapporteur's proposal that the Commission should reproduce guideline 4.4.3 of the Guide to Practice on Reservations to Treaties in draft conclusion 13, given that the Commission had decided at the time of drafting the Guide not to include a provision prohibiting reservations to treaty provisions that reflected *jus cogens* norms.

The sections of the report on the consequences of *jus cogens* for the law of State responsibility, and specifically on the non-applicability of circumstances precluding wrongfulness and the particular consequences of serious breaches of *jus cogens*, were important and interesting, and contained relevant references to jurisprudence, as well as to the Commission's 2001 articles on responsibility of States for internationally wrongful acts, articles 40 and 41 of which served as the basis for draft conclusions 20 and 21.

The Special Rapporteur's proposed draft conclusions also dealt with other effects of *jus cogens* beyond the law of treaties. Some of the draft conclusions, such as draft conclusions 10 and 17, contained redundancies. Draft conclusions 12 and 14 needed to be redrafted. As for draft conclusion 15, he agreed with the Special Rapporteur that the persistent objector doctrine did not apply to *jus cogens* norms. Draft conclusion 16 required some revision to clarify the concept of "unilateral acts".

With regard to draft conclusion 17, he was not convinced of the need to emphasize the resolutions of the United Nations Security Council, particularly since they could be vetoed and States were also called on to comply with resolutions of the General Assembly. He also questioned whether the word "binding" was necessary and, if so, what characterized a "binding resolution". While the Special Rapporteur had attempted to provide explanations in his report, that draft conclusion should be revised.

Draft conclusion 18 placed greater emphasis on the relationship between peremptory norms of general international law (*jus cogens*) and *erga omnes* obligations than on their effects, and should therefore be reformulated. He agreed with Mr. Rajput that reference should be made to general principles of law. In his view, draft conclusions 20 and 21 could be merged. Draft conclusion 23 called to mind the draft article 7 proposed in the fifth report of the Special Rapporteur on the immunity of State officials from foreign criminal jurisdiction. Although that draft article had not yet been definitively adopted, the draft conclusion could perhaps be redrafted and split into two conclusions reflecting the two parts of its title.

He urged caution in drawing up an indicative list of *jus cogens* norms. During the debate in the Sixth Committee on the work of the Commission's sixty-ninth session, some delegations had expressed support for a "non-exhaustive list based on a clear legal rationale and on prudence". It had also been noted that, in identifying peremptory norms, the Commission should include grounds and evidence on which it would base its selection, or that the selection should be based on States' consent and that peremptory norms should fulfil criteria already identified by the Commission.

In conclusion, he said that he would not object to all of the draft conclusions being sent to the Drafting Committee.

Mr. Vázquez-Bermúdez said that the Special Rapporteur's ambitious third report addressed a wide range of aspects related to the legal effects of *jus cogens* norms with legal rigour, based on the practice of States, jurisprudence and the literature. In general, he supported the approach adopted by the Special Rapporteur. When it came to terminology, however, it was not clear why a distinction was made between the words "effects" and "consequences". For example, the titles of draft conclusions 15, 16 and 17 referred to "consequences", while the title of draft conclusion 19 referred to "effects". It might be preferable to refer simply to the "effects of peremptory norms of international law (*jus cogens*)", it being understood that what was meant was the legal effects. Draft conclusion 20, on the duty to cooperate, and draft conclusion 21, on the duty not to recognize or render assistance, referred to "consequences" but in the sense of the consequences of a violation of a breach of a *jus cogens* norm. Those issues should be taken up by the Drafting Committee.

He agreed with the Special Rapporteur's analysis in the section of the report concerning the legal effect of the invalidity of treaties on account of conflict with

peremptory norms of general international law (*jus cogens*), as codified in articles 53 and 64 of the 1969 Vienna Convention. With regard to a treaty that was invalid *ab initio* because, at the time of its conclusion, it conflicted with a peremptory norm of general international law, by definition a treaty that did not come into being did not give rise to any rights or obligations. However, as the Special Rapporteur had rightly noted, in accordance with article 71 of the 1969 Vienna Convention, the consequences of any act performed in reliance on a provision which conflicted with the peremptory norm of general international law should be eliminated as far as possible. Article 71 (2) applied in the case of existing treaties that had become void and terminated when a new peremptory norm of general international law had emerged with which they were in conflict, because such treaties had come into being and created rights, obligations or legal situations that would be maintained despite the subsequent invalidity and termination, but only to the extent that their maintenance was not in itself in conflict with the new peremptory norm of general international law.

While article 71 (2) of the 1969 Vienna Convention provided only that certain rights, obligations or legal situations would be maintained, the Special Rapporteur's analysis of article 44 (5) of the Convention with regard to the non-separation of the provisions of the treaty seemed appropriate, as that provision did not include cases falling under article 64. It could thus be concluded that some provisions could be maintained. That analysis was in line with the commentary to draft article 61 on the law of treaties adopted by the Commission. He therefore supported draft conclusions 10, 11 and 12.

While it was evident that the principle of systemic integration set out in article 31 (3) (c) of the 1969 Vienna Convention — which necessarily included *jus cogens* norms — applied as part of the basic rule of treaty interpretation, he agreed with Mr. Nolte that it would be preferable to have a general conclusion that referred to the interpretation not only of treaties but also of rules arising from other sources of international law, such as customary norms, general principles of law and unilateral acts, and of obligations derived from binding decisions of international organizations, although the latter, not being a true source of international law, would require separate treatment.

The report of the Study Group on fragmentation of international law had already indicated that, in determining the relation between two or more rules, such rules should be interpreted in accordance or by analogy with the 1969 Vienna Convention, in particular articles 31 to 33 thereof. In that context, he agreed that it would be difficult for a conflict to arise between a general principle of law and a norm of *jus cogens* and that, in any event, a potential conflict could be resolved by interpreting the principle consistently with the *jus cogens* norm. That point should be explicitly mentioned in a draft conclusion.

Paragraph 1 of draft conclusion 12 should include wording to the effect that parties to a treaty invalidated by being in conflict with a peremptory norm of general international law at the time it was concluded had a legal obligation to eliminate the consequences of any act performed in reliance of the treaty "as far as possible", in line with article 71 of the 1969 Vienna Convention. Reference should also be made to the obligation set out in article 71 (1) (b) of the Convention, whereby States or international organizations should bring their mutual relations into conformity with the peremptory norm of general international law.

Draft conclusion 13 dealt appropriately with the effects of peremptory norms on reservations to treaties. States and international organizations could not avoid the peremptory nature of a *jus cogens* norm by entering a reservation to a treaty provision that reflected such a norm, and a reservation to a treaty could not, therefore, exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.

Draft conclusion 14 set out an appropriate procedure for settling disputes involving conflict between a treaty and a peremptory norm of general international law, including disputes between States parties and non-parties to the treaty, but it should expressly refer to cases in which article 66 of the 1969 Vienna Convention, establishing the jurisdiction of the International Court of Justice, applied. Paragraph 2 of draft conclusion 14 correctly stated

that the fact that a dispute involved a peremptory norm of general international law was not sufficient to establish the jurisdiction of the Court without the consent of the parties.

As others had said, the draft conclusions on *jus cogens* and treaties applied equally to international organizations, which were subjects of international law and could conclude treaties that might, theoretically, conflict with a *jus cogens* norm. In line with the Commission's articles on the responsibility of international organizations, which included a chapter on serious violations of obligations under peremptory norms of general international law, international organizations should also be included in the Special Rapporteur's analysis of the consequences of peremptory norms for the law of State responsibility.

Draft conclusions 19, 20 and 21 were well founded in the work of the Commission, particularly its articles on responsibility and associated commentaries, and were supported by other materials identified by the Special Rapporteur.

With reference to paragraph 137 of the third report, he assumed that it was not the Special Rapporteur's intention to add resolutions of the Security Council to the sources of international law listed in Article 38 (1) of the Statute of the International Court of Justice. The binding nature of Security Council resolutions was rooted in a treaty — specifically, Chapter VII of the Charter of the United Nations — but resolutions of the Security Council were not a source of international law *per se*. In the event of a conflict between a *jus cogens* norm and an obligation arising from a Security Council resolution, the peremptory norm would clearly take precedence, rendering the resolution invalid. If a conflict between a *jus cogens* norm and a treaty resulted in the treaty being invalidated, there was even greater reason to suppose that an analogous conflict with a resolution of a body created by such a treaty would result in invalidation. Again, it was to be hoped that interpreting resolutions in a manner consistent with hierarchically superior *jus cogens* norms would avoid that consequence. The same applied to resolutions and decisions of other international organizations.

In general, he agreed with draft conclusion 15, particularly in terms of the non-applicability of the persistent objector rule, although he would prefer the word "rule" to be altered to "doctrine". There could be no persistent objection to the prohibition of genocide or crimes against humanity, or to other norms reflecting the fundamental values of the international community. With reference to draft conclusion 16, he suggested that an explanation could be included in the commentary to point out that the draft conclusion referred to unilateral acts that aimed or attempted to create rights or obligations, which must for that purpose be compatible with peremptory norms of general international law. Similarly, the commentary to draft article 18 should specify that *jus cogens* norms created obligations *erga omnes* but that such obligations could also be created by norms that were not necessarily peremptory in nature.

While not disagreeing with draft conclusions 22 and 23, he cautioned against duplicating the Commission's work on immunity of State officials from foreign criminal jurisdiction, particularly in terms of exceptions to such jurisdiction *ratione materiae*. To that end, the Drafting Committee should postpone discussion of paragraph 2 of draft conclusion 23 at least until draft article 7 of the Commission's draft articles on immunity of State officials from foreign criminal jurisdiction had been approved on second reading.

With those comments, he expressed support for referring all 23 draft conclusions to the Drafting Committee. He looked forward to seeing how the issue of providing an illustrative list of norms of *jus cogens* would be tackled.

Mr. Murase, while expressing appreciation for the Special Rapporteur's well-researched third report, said that he was troubled by the number of draft conclusions proposed. Four or five should be the maximum presented at a single session of the Commission if they were to be given the careful consideration they deserved, and the 14 currently before the Commission should have been divided between two or three reports, perhaps along the lines suggested by Mr. Murphy. The topic of *jus cogens* was an important and difficult one and its consideration should not be rushed.

It was also regrettable that commentaries had not yet been submitted for the draft conclusions already adopted by the Drafting Committee. Waiting until all draft conclusions on an issue were ready before provisionally adopting them with accompanying commentaries was an undesirable practice: it would be better to discuss commentaries each year, when memories of the debate on the conclusions to which they related were fresh. Prolonging the process of adopting draft conclusions and commentaries also deprived the Sixth Committee of the General Assembly of the chance to comment on them in a timely manner.

While he welcomed the fact that the Special Rapporteur had taken up the issue of State responsibility, it should be considered not only in the context of effects and consequences but also from the perspective of the overall categorization of *jus cogens*, including the definition and content thereof. In the context of the law of treaties, hierarchical superiority was essential to define a norm as one of *jus cogens*, but that was not the case for the law of State responsibility. The effect of a violation of a *jus cogens* norm under the law of treaties was simply to nullify any agreement that conflicted with the higher norms of *jus cogens*. Under the law of State responsibility, the effects of such a violation went much further.

Draft conclusions 19 to 21 reflected part II, chapter III, of the articles on the responsibility of States for internationally wrongful acts adopted in 2001, but the Special Rapporteur had failed to address other aspects of the legal consequences of such acts, such as reparations, cessation and non-repetition, or the implementation of the international responsibility of a State. Nor did the report cover the provisions of articles 48 or 50 (1) (d) of the articles on State responsibility.

While *jus cogens* in the law of treaties concerned the invalidity of agreements, in the law of State responsibility it concerned the actual conduct of States. The Special Rapporteur and the Commission would need to develop an integrated concept of *jus cogens* that covered both branches of international law.

Paragraphs 146 to 149 of the third report and draft conclusion 16 referred to unilateral acts. States' unilateral actions were divided into three categories: unilateral acts, unilateral declarations and unilateral measures. If unilateral declarations were understood as relating to unilateral acts *stricto sensu*, in accordance with the Commission's 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, they could be assimilated to unilateral acts. For the topic at hand, what mattered were unilateral acts and unilateral measures.

Unilateral acts were juridical acts binding not only on the addressee State but also on the State that undertook them. Even though they were unilateral, their function was to apply existing rules of international law arising from either treaty or custom. Examples based on treaties included entering a reservation to a treaty and unilaterally submitting a contentious case to the International Court of Justice under Article 36 (2) of its Statute, while the recognition of a State or Government was a unilateral act based on customary international law.

Jus cogens could be relevant to recognition of a new State. In the 1930s, a policy known as the Stimson Doctrine had been advocated by the United States of America to the effect that "illegally" created States, such as Manchukuo, should not be recognized. Later, the United Nations had called for non-recognition in regard to Southern Rhodesia, Namibia and Transkei. However, there seemed to be a significant difference between the recognition of States and of situations: the former was a question of the applicability of a centuries-old rule of international law, while the latter normally referred to a composite application of relevant rules leading to the situation in question. The question of recognition of States would be better addressed as a unilateral act.

It was regrettable that the International Law Association's Committee on Recognition/Non-Recognition in International Law had not referred to *jus cogens* in the context of the recognition of States in its reports; however, at a meeting of the Committee in December 2014, Professor Keun-Gwan Lee had remarked that there was a broadly recognized obligation of non-recognition in cases where *jus cogens* had been breached. The question of *jus cogens* should therefore be considered in the context of recognition or non-

recognition of States or Governments as a unilateral act based on customary international law.

In parallel to unilateral acts, unilateral measures should also be considered in the context of *jus cogens*. While the former, as juridical acts, were based on existing treaties or customary international law, the latter were taken by States where the applicable law was obscure or still in flux. Some unilateral measures were opposable, but others were not. Unilateral extensions of maritime jurisdiction, unilateral economic sanctions and unilateral law enforcement actions were some examples of unilateral measures; in some cases, they might be regarded as violations of *jus cogens*.

The reminder of the *erga omnes* nature of *jus cogens* obligations contained in draft conclusion 18 was perhaps unnecessary as a conclusion and could be better explained in the commentary. The concept of *erga omnes* obligations had emerged in contrast to the traditional reciprocal obligations in bilateral State relations and demonstrated the horizontal expansion of obligations under international law. *Jus cogens*, at least in the context of treaty law, dealt with the vertical relations between higher law and lower agreements. Draft conclusion 18 gave the erroneous impression that *erga omnes* and *jus cogens* obligations occupied the same horizontal plane. If the definition of *jus cogens* were to be reformulated in line with the law of State responsibility, then the relations between the two sets of obligations could be meaningfully discussed, but that did not appear to be the position taken by the Special Rapporteur.

Draft conclusions 22 and 23 would be acceptable provided that it was known in advance what crimes prohibited by peremptory norms of general international law were to be covered. The report provided no details in that respect. Identifying what crimes were envisaged should logically precede discussion of issues such as the State's duty to exercise jurisdiction, criminal responsibility and immunity.

With reference to the Special Rapporteur's plan for future work, he expressed doubts about whether consideration of the third report could be concluded during the present session. It would take some time to agree on how to proceed with the question of a list of *jus cogens* norms, even if it were purely illustrative. Moreover, he considered any discussion of regional *jus cogens* to be absurd in the context of the present topic: it was contrary to the basic notion of *jus cogens* as a norm accepted and recognized by the international community of States as a whole. The danger of fragmentation through the introduction of regional *jus cogens* would be much more serious than the recognition of particular customs in customary international law.

He wished to express concern about the proliferation of sets of conclusions on various topics: in fact, it was not proper to call the product of the Commission's work "conclusions", and he hoped that the Special Rapporteur and Commission would give that matter serious consideration. Nevertheless, he was in favour of referring all the draft conclusions contained in the Special Rapporteur's third report to the Drafting Committee, taking into account the views expressed during the discussion.

The meeting rose at 1 p.m.

Provisional

For participants only

21 September 2018

Original: English

International Law Commission

Seventieth session (second part)

Provisional summary record of the 3419th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 3 July 2018, at 3 p.m.

Contents

Peremptory norms of general international law (*jus cogens*) (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chairman:	Mr. Valencia-Ospina
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

The Chair invited the Commission to resume its consideration of the third report on peremptory norms of general international law (*jus cogens*) (A/CN.4/714 and A/CN.4/714/Corr.1).

Ms. Galvão Teles said that she shared the Special Rapporteur's view, set out in the syllabus of the topic and repeated in paragraph 20 of the report, that the consideration of the effects and consequences of *jus cogens* was likely to be the most challenging part of the study; as the Special Rapporteur emphasized in the same paragraph, it was also the most important part. In addition, she supported his approach of avoiding theoretical debates. The report had been carefully prepared and drafted and flowed from the aforementioned premises. She supported its general thrust, while believing that some aspects needed to be further analysed and improved.

The Special Rapporteur seemed to be guided by the conviction that any departure from the provisions of the 1969 Vienna Convention on the Law of Treaties would be detrimental to the unity of the international legal order. Hence, he focused in the report on the constant need to maintain consistency with the 1969 Vienna Convention as the main primary source. In her view, he had generally succeeded in preserving several of its delicate balances. However, some aspects needed further consideration, in particular but not only in the areas covered that did not stem directly from the 1969 Vienna Convention or from the Commission's previous work on State responsibility.

On the relationship between the criteria for peremptory norms of international law and the consequences of those norms, it seemed to her that the appropriate reading was a complementary one in which criteria were distinguished from consequences, but to the detriment of neither. Each element had its own function: to identify peremptory norms and then to focus on the particular consequences of their application. Such a complementary reading demonstrated that non-derogability was a criterion for the identification of *jus cogens* norms as well as a consequence of such norms.

In his second report, the Special Rapporteur had stated that the question of who determined whether the criteria for *jus cogens* had been met fell beyond the scope of the topic. In the third report, he mentioned briefly in paragraph 13 that the issue had been raised during the debate in the Sixth Committee at the seventy-second session of the General Assembly. Although it was undoubtedly one of the most important issues relating to *jus cogens*, a narrow reading of the Commission's mandate for the topic would indeed lead to the conclusion that it should be excluded. However, the Commission might be in a position to provide guidance on the issue, which could, in her view, be included in the commentary.

At the same time, besides the possible preparation of an illustrative list of *jus cogens* norms, the added value of the focused consideration of the topic by the Commission, drawing on its previous work on the law of treaties and State responsibility, was indeed to look at the consequences of such norms for other areas of international law, such as individual criminal responsibility; customary international law and other sources of international law or legal acts, such as unilateral acts and resolutions of international organizations; and the settlement of disputes. While practice was not abundant, as stated by the Special Rapporteur and others, especially with regard to the latter instances, it was possible to point to the main consequences. She would therefore concentrate in her remarks on the proposed draft conclusions that went beyond the legal regime of *jus cogens* set out in the 1969 Vienna Convention and in the articles on responsibility of States for internationally wrongful acts and that needed to be more carefully examined, namely draft conclusions 14 to 18, 22 and 23.

With regard to the structure and basic approach of the report, she agreed that the proposed draft conclusions should be divided into different parts and took the view that that task should be undertaken by the Drafting Committee at the current session. There were different possible ways of dividing them, but in her view the structure should be based on

essentially three types of consequences that flowed from *jus cogens* norms: the nullity of legal acts arising from treaties or other sources of international law that were incompatible with or in conflict with *jus cogens* norms; the consequences of the breach of such norms; and other consequences. Regarding draft conclusions 10 to 13, which dealt with the consequences of *jus cogens* with regard to treaties, she suggested, as Mr. Murphy had done, that they should follow more closely the structure and content of articles 53, 64 and 71 of the 1969 Vienna Convention; articles 31 and 44 should likewise be taken into account. Those changes could also be made by the Drafting Committee at the current session. The wording of draft conclusions 19 to 21, which addressed the consequences of *jus cogens* in terms of State responsibility, should also be brought into line with the relevant provisions of the 1969 Vienna Convention; in particular, as pointed out by Mr. Murphy and Mr. Nolte, the word "serious" should be added to qualify the word "breach" in draft conclusion 21. The Commission should also consider the potential need for a separate draft conclusion addressing further the issue of countermeasures in connection with article 50 (1) (d) of the articles on State responsibility, as proposed by, for example, Mr. Park and Ms. Lehto.

Draft conclusion 14 was an important one, especially given the lack of an objective system for determining the existence and consequences of peremptory norms of general international law. However, the provisions of the 1969 Vienna Convention on which the draft conclusion was based established a complex system that, unlike the draft conclusion, included all means of peaceful settlement of disputes, not only submission to the International Court of Justice and arbitration. At the same time, not all States were parties to the 1969 Vienna Convention, and many States had formulated a reservation concerning article 66 thereof, as Mr. Park had mentioned. She therefore suggested that paragraph 1 of the draft conclusion should be reformulated in order to include a reference to other means of peaceful settlement of disputes, as mentioned in article 65 (3) of the 1969 Vienna Convention. Mr. Nolte had made an interesting proposal in that regard that merited consideration by the Drafting Committee. Paragraph 2, in her view, should be reformulated as a "without prejudice" clause with respect to the rules concerning the jurisdiction of the International Court of Justice, rather than stating that the fact that a dispute involved a peremptory norm was not sufficient to establish the jurisdiction of the Court.

Draft conclusions 15, 16 and 17 provided for the invalidity or nullity of other sources of international law besides treaties — namely custom, unilateral acts and resolutions of international organizations — where those sources conflicted with *jus cogens*. Perhaps, as mentioned by other members, general principles of law should also be included among those sources.

Regarding draft conclusion 15, there had been discussion, reflected in the literature, as to whether rules of customary international law could conflict with *jus cogens* and what the consequences of such a conflict should be. She agreed with Mr. Park on the need to understand better the meaning of "conflict" in that context. Authors such as Kolb and Tomuschat had argued that a customary international law rule could not arise if it conflicted with *jus cogens*, which seemed to be the position taken by the Special Rapporteur in the draft conclusion. A different position had, however, been taken by Judges Rozakis and Caflisch in the case of *Al-Adsani v. the United Kingdom* before the European Court of Human Rights. In paragraph 1 of their joint dissenting opinion, they had stated: "For the basic characteristic of a *jus cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule." She shared that point of view and believed that it applied to customary international law rules. Like Mr. Saboia and other members, she supported the proposition set out in paragraph 3 of the draft conclusion regarding the persistent objector rule.

She also supported draft conclusion 16 and agreed that the Drafting Committee could work on refining the wording.

With regard to draft conclusion 17, her position was similar to the position that she had expressed regarding draft conclusion 15. It was not a matter of whether or not

resolutions established binding obligations but whether they were rendered void or failed to produce legal effects if they conflicted with a *jus cogens* norm, as Mr. Šturma had seemed to indicate. At the same time, she agreed that the draft conclusion could be formulated in a more general way, covering all relevant resolutions of international organizations, with the special situation of Security Council resolutions being explained in the commentary. Other members, including Mr. Saboia, Mr. Murphy and Mr. Nolte, had also made relevant comments questioning the reference to Security Council resolutions.

She agreed with the inclusion of draft conclusion 18 but took the view that it needed to be rephrased in order to better reflect the relationship between *jus cogens* norms and obligations *erga omnes*, and also the consequences arising from them. She suggested two alternative formulations. The first was based on the current wording proposed by the Special Rapporteur, which would be changed to read: "Peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes*, regarding which all States have a legal interest in their protection." The second, which was closer to paragraph 33 of the judgment of the International Court of Justice in the case concerning the *Barcelona Traction, Light and Power Company, Limited* and to paragraph 10 of the commentary to article 48 of the articles on State responsibility, would read: "Peremptory norms of general international law (*jus cogens*) establish obligations *erga omnes* regarding which each State is entitled to invoke the responsibility of another State for breach of such obligations." Mr. Murphy had suggested similar wording.

She supported draft conclusion 22 for the reasons given by the Special Rapporteur and also, in particular, by Ms. Lehto.

As to draft conclusion 23, she supported paragraph 1 but believed that the wording could be improved by the Drafting Committee. She agreed with the proposed text of paragraph 2 and favoured its referral to the Drafting Committee; however, given its close link to the topic "Immunity of State officials from foreign criminal jurisdiction", she concurred with Mr. Jalloh and Mr. Vázquez-Bermúdez that its consideration by the Drafting Committee should be suspended until the first reading of the draft articles on immunity had been completed.

With regard to future work on the topic, she supported the Special Rapporteur's suggestions concerning an illustrative list of *jus cogens* norms and the question of regional *jus cogens*, as set out in paragraph 162 of his report.

She was in favour of referring all 14 proposed draft conclusions to the Drafting Committee, which should of course take into account the foregoing remarks and the other suggestions made in the plenary. She agreed that the Commission should finish the first reading of the draft conclusions at its next session.

Mr. Hassouna said that the report was clear, well structured and well researched, and provided the Commission with rich material on which to base its discussions. Although the length of the report went well beyond the recommended limit, that could be overlooked thanks to its valuable content and thorough analysis of the consequences of *jus cogens*.

As evidenced by the debate both in the Commission and in the Sixth Committee, the concept of *jus cogens* was a source of substantial controversy. As early as 1969, at the time of adoption of the Vienna Convention, it had been deemed an obscure term for an obscure notion, and that sentiment seemed to remain largely unchanged. During the United Nations Conference on the Law of Treaties, many delegations had expressed the view that the effect of peremptory norms was to impose limitations on the contractual will of States. Other delegations had viewed *jus cogens* as an essential organizational tool for the international community, necessary to maintain stability and legal certainty and to strengthen the rule of law in international relations. Delegations had repeatedly emphasized that peremptory norms served the interests of the international community as a whole, as opposed to the needs of individual States.

It was clear from the report that, during the most recent debate in the Sixth Committee, most States had continued to express support for the Commission's consideration of the topic, while a few States had continued to express concern. During the Commission's debate at the current session on the consequences of peremptory norms of

general international law, members had expressed divergent views on a number of issues. In his opinion, it was important for the Special Rapporteur to take all the different concerns and viewpoints into consideration, as that would help to achieve the Commission's aim of clarifying the concept of *jus cogens* from an international law perspective.

He agreed that the effects and consequences of *jus cogens* were the most challenging and the most important aspect of the topic. He fully supported the Special Rapporteur's methodological approach of avoiding theoretical debates and instead conducting a thorough analysis of State practice in all its forms, judicial practice, literature and any other relevant material. He further supported the Special Rapporteur's decision not to adopt any particular systematic approach but rather to focus on those potential consequences of *jus cogens* that had most often been identified and that raised important practical problems for States and for international and national courts.

With regard to proposed draft conclusions 10 and 11, the use of the terms "void" and "invalid" should be clarified by the Special Rapporteur. Under the 1969 Vienna Convention, the terms were not interchangeable: the drafting history showed that the Commission had deliberately selected "void" and "invalid" to serve in different contexts. The distinction between the two terms centred on the grounds for invalidity: "invalid" implied State consent, while "void" referred to the legal status of an improperly concluded treaty, regardless of the grounds for invalidity. On that basis, he took the view that the word "void" should be used in the draft conclusions where the grounds for invalidity did not turn on State consent.

The term "conflict" was used in a number of the proposed draft conclusions, yet there was no definition of it in the report. In his view, such a definition would be required by States invoking the draft conclusions and by courts or other bodies that were deciding whether a conflict existed.

In paragraph 30 of the report, it was stated that some writers had noted cases of invocations of invalidity of treaties on account of conflict with *jus cogens*. For example, one writer had suggested that the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights were invalid on the grounds that they were in conflict with the *jus cogens* norm of self-determination. That suggestion was misleading and lacked credibility; in the Arab Charter on Human Rights, for example, the right of self-determination was referred to both in the preamble and in article 2.

Noting that paragraph 3 of draft conclusion 10 provided that treaties should, as far as possible, be interpreted in a way that rendered them consistent with *jus cogens*, he said that the commentary should emphasize that such interpretation should not override the interpretative rules enshrined in the 1969 Vienna Convention or customary international law.

It should be made clear in the commentary that draft conclusion 13 was based on the relevant guideline from the Guide to Practice on Reservations to Treaties, but also, as mentioned by others, that the wording was not identical.

With regard to unilateral acts that were in conflict with *jus cogens*, as referred to in draft conclusion 16, the meaning of the term "unilateral act", and whether it included unilateral acts of international organizations, should be clarified. It should also be emphasized that the draft conclusion related only to formal unilateral acts that created legal obligations as opposed to any type of act undertaken unilaterally.

Noting that draft conclusions 19 to 21 were based on articles 26 and 41 of the articles on State responsibility, he said that they should be further harmonized with all the articles on State responsibility related to *jus cogens*. Moreover, since the obligations that applied to States, including the duty to comply with peremptory norms, also applied to international organizations, the obligations of those organizations should be examined in order to clarify any distinctions between them and the obligations of States.

Turning to draft conclusion 15, he noted that, in paragraphs 1 and 2, the principles set out in articles 53 and 64 of the 1969 Vienna Convention were applied to the customary international law context. The Special Rapporteur convincingly advocated support for the two paragraphs by stressing the superior standing of *jus cogens* norms in the hierarchy of

international law. Though the examples provided in the report contained different wording, the premise was the same. The content of the two paragraphs was supported by State practice and the decisions of national and regional courts, such as a 2011 judgment of the High Court of Kenya, in which the Court had emphasized that *jus cogens* norms rendered void any other pre-emptory rules which came in conflict with them.

With regard to paragraph 3 of the draft conclusion, the non-applicability of the persistent objector doctrine to *jus cogens* norms was grounded in case law, commentary and logic; the doctrine stood in direct opposition to the universal application of *jus cogens* norms. Some writers had commented that the clash between the underlying functions of *jus cogens* and the persistent objector rule could be resolved by emphasizing the pre-eminence of *jus cogens* norms.

Draft conclusion 17 was one of the more controversial of the proposed draft conclusions, and consideration of it was made more difficult by the paucity of State practice. However, its content was particularly important, since binding determinations in Security Council resolutions, like *jus cogens* norms, had the unique characteristic of being hierarchically superior to other rules. In addition, Article 103 of the Charter of the United Nations provided that obligations under the Charter prevailed over obligations under any other international agreement. It should also be remembered that, in spite of its prominent position, the Security Council was constrained by the provisions of the Charter; as the International Court of Justice had emphasized in its 1948 advisory opinion on *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*: "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment." In particular, the Council must, under Article 24 (2) of the Charter, act in accordance with the purposes and principles of the United Nations; under Article 1 (1), one of the purposes was to bring about a resolution of international disputes by peaceful means and in conformity with the principles of justice and international law. More recently, the question of compatibility of Security Council resolutions with international law had been considered by the International Court of Justice in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, brought before the Court in 1992.

With that background in mind, the Special Rapporteur convincingly suggested that Security Council resolutions were subject to *jus cogens* norms and the principles and purposes of the United Nations, as set out in the Charter, some of which might themselves constitute *jus cogens*. He found support for his view in the positions taken by a number of States, decisions adopted by national, regional and international courts, and the conclusions of the work of the Study Group on fragmentation of international law. In reality, as suggested by the Special Rapporteur, it was highly unlikely that the Security Council would adopt a resolution that, on the face of it, was in conflict with a peremptory norm of international law; if such a case arose, the Vienna rules of interpretation would become relevant. However, the International Court of Justice, in its 2010 advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, had stated that, although those rules might provide guidance, the interpretation of Security Council resolutions might require other considerations to be taken into account. In any event, he agreed that interpretation should, to the extent possible, be consistent with general international law, including *jus cogens*, as provided in paragraph 2 of the draft conclusion.

He agreed with the suggestion made by the Special Rapporteur in his oral introduction that the draft conclusion could be reformulated to refer to resolutions in general as opposed to binding resolutions, so as to make it clear that, to have legal effect, all resolutions must be consistent with *jus cogens*, even if they were not binding. The wording proposed by the Special Rapporteur could be expanded further by including a reference to other decisions that had legal effects.

Turning to draft conclusion 22, he noted that paragraph 1, in which it was asserted that States had a duty to exercise jurisdiction over crimes prohibited by *jus cogens*, was modelled on draft article 7 of the draft articles on crimes against humanity. Such a duty would have an impact on State sovereignty in that States would be compelled to exercise

national criminal jurisdiction over all crimes prohibited by *jus cogens* that were committed by their nationals or on their territory. According to the Special Rapporteur, it was generally accepted that there existed a duty to prosecute; however, the analysis provided in the report did not support that conclusion. As evidence of State practice, the Special Rapporteur cited various conventions and national laws prohibiting crimes that constituted violations of *jus cogens*. However, the existence of those laws did not necessarily reflect a recognized duty under customary international law because they did not provide evidence of the requisite *opinio juris*. For example, the national laws mentioned in support of an obligation to prosecute the crime of genocide were all laws of States that were also parties to the Convention on the Prevention and Punishment of the Crime of Genocide. Those States could have adopted their national laws on the basis of their treaty obligation to do so, or on the basis of other national considerations. The International Court of Justice had found that the existence of national legislation constituted State practice, but it generally looked for acknowledgement that the practice was undertaken out of a sense of legal obligation. It was understandably difficult to establish *opinio juris* in the current context, since it was nearly impossible to ascertain the intent behind the enactment by States of national legislation. In his view, therefore, further exploration of State practice was needed. Even if there was no duty to exercise jurisdiction over such crimes, paragraph 1 of the draft conclusion could be reformulated as a recommendatory provision. As to paragraph 2, it was correctly phrased as a "without prejudice" clause and should be retained as such to allow for the potential exercise of universal jurisdiction, as discussed by the Special Rapporteur in paragraph 118 of the report.

With regard to draft conclusion 23, in his view the report was rightly aimed at covering all practice on *jus cogens*, including in relation to immunity *ratione materiae*. Although the proposed draft conclusion was inherently controversial in that it was based on draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction, the Special Rapporteur had taken a comprehensive approach to the issue and had produced a thorough analysis, which was set out in paragraphs 121 to 132 of the report. The difficult nature of the subject was reflected in a recent judgment of the Supreme Court of Appeal of South Africa, in which the Court had found that there was no exception to immunity *ratione materiae* on the basis of *jus cogens* and had quoted the following observation of Professor John Dugard in that regard: "customary international law is in a state of flux in respect of immunity, both criminal and civil, for acts of violation of norms of *jus cogens*". The difficult nature of the subject also explained the differing views expressed by Commission members in the current debate and by States in the Sixth Committee concerning draft article 7 of the draft articles on immunity as provisionally adopted by the Commission. Some States had generally favoured draft article 7, while others had opposed it, had expressed reservations or had called on the Commission to revisit it and clarify it.

Although he supported the proposed draft conclusion in principle, he believed that a more balanced approach might be struck, taking into consideration the concerns raised by States and by some Commission members in the context of the topic of immunity, and also the views of those States and members that favoured exceptions to individual criminal responsibility. Such an approach would consist in narrowing the scope of the draft conclusion and adding a list of applicable crimes. The exceptional nature of the non-applicability of immunity could then be stressed in the commentary. However, most importantly, the Commission should ensure that its discussion of immunity in the context of the draft conclusion and the outcome of that discussion were consistent with its approach to dealing with the topic of immunity and the topic of crimes against humanity. Such a process of harmonization could be undertaken in the Drafting Committee or by coordination among the Special Rapporteurs for the topics concerned.

With regard to future work on the topic, the Special Rapporteur had stated that the next, and possibly final, report would provide proposals on how to proceed with the question of an illustrative list of *jus cogens* norms. Consideration of that question would be welcome, as the idea of producing such a list had received support from States and Commission members. The Special Rapporteur could build on the oft-cited list of the most frequently cited candidates for the status of *jus cogens* produced by the Study Group on fragmentation of international law and the non-exhaustive list set out in the commentary to

the articles on State responsibility. He should make it clear that the prospective list was not exhaustive and could offer illustrative examples and provide context for the identification of new *jus cogens* norms in the future. Since the agreement of States on what norms should be included in the illustrative list was of particular importance, the Special Rapporteur should aim to accommodate their views on that matter as far as possible.

The next report would also address the question of regional *jus cogens*, which had attracted less support from States in the Sixth Committee, but the existence of which had been recognized in international case law and in regional legal systems. The Special Rapporteur could study how the existence of regional *jus cogens* norms related to the universal application of *jus cogens* norms. Lastly, miscellaneous issues raised by the Commission and States would be considered in the next report. Those issues could, in his view, include the question of whether there existed invalid amnesties and invalid statutes of limitations for crimes prohibited by *jus cogens*.

In conclusion, he wished to thank the Special Rapporteur once more for his excellent, thorough and analytical third report on a challenging topic. Although some of the proposed draft conclusions were more controversial than others, they should all, in his opinion, be referred to the Drafting Committee, which had always found solutions to complex issues. In any case, he was confident that the final outcome of the Commission's work on the topic would represent a valuable part of its body of work.

Mr. Huang said that he almost fully shared the views expressed by Mr. Nolte and Mr. Rajput, who had made convincing comments on, in particular, draft conclusions 14, 17, 22 and 23. Having thanked the Special Rapporteur for his report, he said that, before commenting on the topic, he wished to stress the need for the Commission to avoid, to the extent possible, the overlapping of agenda items.

Draft conclusions 10 to 14, pertaining to treaties that were in conflict with peremptory norms, seemed to have structural flaws. Draft conclusions 10 and 11 were based on articles 53 and 64 of the 1969 Vienna Convention, which were placed in two different sections in part V of the Convention: article 53 was in section 2 (Invalidity of treaties), while article 64 was in section 3 (Termination and suspension of the operation of treaties). In both draft conclusions 10 and 11, the invalidity of treaties was addressed in paragraph 1 and the termination of treaties in paragraph 2, while paragraph 3 of draft conclusion 10 dealt with the interpretation of treaties. Since the taxonomic method used in the 1969 Vienna Convention had been well thought out and conformed to general legal logic, it would be best, in his opinion, not to alter that structure in the draft conclusions, so as to avoid the possibility of confusion. He wondered whether paragraph 1 of both draft conclusions could be combined into one draft conclusion, with the respective second paragraphs forming another draft conclusion and paragraph 3 of draft conclusion 10 serving as a separate draft conclusion.

With regard to paragraph 1 of draft conclusion 10, he agreed with the Special Rapporteur's methodology of basing his research on the framework of article 53 of the 1969 Vienna Convention. However, there was a discrepancy between the Convention and the wording of the draft conclusion. He recommended that the terms already established in the Convention should be used because they had been accepted by the majority of countries.

There was also a terminology issue with regard to draft conclusion 11: the words "severability" and "severed" were used in the draft conclusion itself, while the word "severable" appeared in the related sections of the report. Those terms did not tally with the concept of separation used in article 44 of the 1969 Vienna Convention. As indicated in footnote 105 of the report, the term used in the Convention was "separation". As he had stated with regard to draft conclusion 10, terms different from those in the Convention should not be used.

Draft conclusion 12, on the elimination of consequences of acts performed in reliance of an invalid treaty, corresponded with the relevant provisions of article 71 of the 1969 Vienna Convention. However, he wondered why articles 69 and 70, which also dealt with the consequences of the invalidity and termination of treaties, were not mentioned; other members had also voiced perplexity on that score. It would be appreciated if the

Special Rapporteur could clarify whether articles 69 and 70 were applicable as general provisions to the consequences of a conflict of a treaty with peremptory norms.

On draft conclusion 13, it was stated in the report that a reservation to a treaty provision that reflected a peremptory norm of general international law did not affect the binding nature of that norm because the treaty provision to which a reservation was being formulated and the *jus cogens* norm in question had a separate existence, a point that he did not dispute. However, he had noted some discrepancies in the terms used in some of the footnotes in the report concerning the Guide to Practice on Reservations to Treaties.

In his view, the recommended procedure regarding settlement of disputes set out in draft conclusion 14 was flawed. The 1969 Vienna Convention did not provide that a dispute concerning the application or interpretation of article 53 or article 64 should be referred immediately to the International Court of Justice for a decision; rather, under article 66, the possibility of recourse to the Court existed only when the dispute was not resolved within a given time frame following the application of the relevant provision of article 65. However, that step was completely omitted from the draft conclusion, which provided directly that any dispute should be submitted to the International Court of Justice. The relationship between articles 65 and 66 was wisely mentioned in paragraphs 46 and 47 of the report; in his view, it would have been appropriate to add the relevant wording from article 65 to the draft conclusion. Respect for the principle of State consent was an issue of significant concern to many States. Any hasty referral of a dispute to the International Court of Justice would fail to accommodate that concern and would indirectly deprive the parties concerned of their right to resolve disputes through negotiations and other means. He fully agreed with Mr. Rajput, who had questioned the need for the draft conclusion.

Draft conclusion 17, in his view, presented serious problems. First, the resolutions of the Security Council were not the only binding resolutions adopted by international organizations; hence, it seemed unnecessary to single out Security Council resolutions and to stress conflicts between them and *jus cogens*. In addition, neither the report nor the text of the draft conclusion contained a clear statement of the legal consequences of a conflict between a Security Council resolution and a peremptory norm: it was not specified whether the whole resolution was rendered invalid or whether only the relevant provisions were affected. According to the analysis in the report pertaining to draft conclusion 11, a treaty that was in conflict with a peremptory norm was invalid in whole; on that basis, it seemed that any conflict between a Security Council resolution and a peremptory norm would render the resolution invalid in whole. Yet there was quite a difference between Security Council resolutions and treaties. The idea that it was appropriate to directly apply the relevant articles of the 1969 Vienna Convention in the case of Security Council resolutions was not well supported.

Draft conclusion 17 also touched upon the issue of responsibility of international organizations, which the Commission had debated in the past: the Special Rapporteur for that topic had submitted eight reports and, after many years of effort, the Commission had eventually adopted the articles on the responsibility of international organizations. The Commission's outputs on previously discussed topics were valuable intellectual assets and could serve as a reference for discussions on other topics. The articles in question clearly provided that international organizations could independently assume international responsibility as subjects of international law; they also provided for institutional arrangements on specific issues in that regard. The draft conclusion referred to the possibility that international organizations, including the United Nations, might adopt binding resolutions that conflicted with peremptory norms of general international law. In such a case, the issue of the responsibility of those organizations might arise. In the report, however, only the issue of State responsibility was discussed.

Draft conclusion 18 dealt with the relationship between *jus cogens* and obligations *erga omnes*. The articles on State responsibility, however, made no mention of obligations *erga omnes*.

Draft conclusion 19 pertained to the effects of *jus cogens* on circumstances precluding the wrongfulness of an act. Paragraph 1 reflected the content of article 26 of the

articles on State responsibility, to which he had no objection. However, the circumstances described in paragraph 2 required further careful consideration.

Draft conclusions 20 and 21 were basically consistent with articles 40 and 41 of the articles on State responsibility; however, draft conclusion 21 referred to a "breach" rather than a "serious breach" of a peremptory norm. In the report, the Special Rapporteur gave an explanation of the discrepancy: "While the duty to cooperate to bring to an end situations created by a breach requires positive concerted, perhaps onerous, action, the duty not to recognize, aid or assist, merely requires State to abstain from conduct." Clearly, the threshold with respect to the duty not to recognize, aid or assist was quite low. Yet it was also obvious that the same situation had existed when the articles on State responsibility had been drafted; nonetheless, the words "serious breach", representing the higher threshold, had been used. It should be mentioned that, in discussing the duty to cooperate, the Special Rapporteur cited the advisory opinion of the International Court of Justice on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and the Court's South West Africa* cases to demonstrate that States must cooperate to bring to an end through lawful means any serious breach of *jus cogens*. Since the breach in both those cases had been serious, it was inappropriate to cite them as arguments for the duty not to recognize or render assistance in the case of a breach that was not qualified as serious. In his view, draft conclusion 21 should be aligned as closely as possible with the relevant content of the articles on State responsibility.

Draft conclusions 22 and 23, in particular 23, had provoked considerable controversy in the Commission. Several members, himself included, were opposed to referring them to the Drafting Committee.

With regard to draft conclusion 22, the report contained a discussion of specific State practice regarding several categories of international offence. In order to draw the conclusion set out in paragraph 1, it would have to be assumed that States exercised jurisdiction over the offences in question specifically because they violated *jus cogens*. However, that assumption could not be substantiated simply by proving that States did in fact exercise jurisdiction over such offences: such State practice might be based on obligations under certain treaties or on domestic laws. For instance, States often established jurisdiction over genocide and war crimes on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide or the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention). Examples of domestic laws were also easily found. In China, article 247 of the Criminal Code established the crimes of extracting confession under torture and obtaining evidence by violence, while article 248 defined the crime of maltreatment of prisoners. The essence of those articles was to prohibit torture, but it seemed that the basis for their inclusion in the Criminal Code was not that the prohibition of torture was part of *jus cogens*: back in 1979, when the prohibition of extracting confession under torture had been included in the Criminal Code, the 1969 Vienna Convention had not yet been in effect, and the definition of torture had not yet been widely recognized. He therefore believed that the conclusion on State practice in the report was defective.

Even if the draft conclusion were eventually adopted, there would still be a question mark over whether States could implement it. For instance, although 104 States had domestic legislation on crimes against humanity, nearly 100 States did not. In addition, the range of offences involved in the draft conclusion might be very broad, but the Special Rapporteur did not specify what those offences were or how many there were. More importantly, *jus cogens* was a set of developing and evolving norms of international law. It was very likely that there would be new offences prohibited by *jus cogens* in the future, and more offences which, though prohibited by *jus cogens*, were not included in domestic laws. That would certainly make it more difficult to implement the provision.

Regarding draft conclusion 23, the issue that it addressed was being considered under the topic of immunity of State officials from foreign criminal jurisdiction; there was therefore no need to discuss it in parallel under the current topic.

The Special Rapporteur attempted to use draft article 7 of the draft articles on immunity to back the draft conclusion. That indeed went too far. It was well known to all

that draft article 7 had provoked major controversy both in the Commission and in the Sixth Committee. Not only did it afford no support to the draft conclusion, but also invoking it in that context would inevitably trigger a new round of debate in the Commission.

As to the Special Rapporteur's analysis concerning the immunity issue, he believed that there was no need to have a lengthy debate at the current juncture, as there had already been an in-depth discussion, under the topic of immunity, of the basic legal issues — the immunity of the troika of Head of State, Head of Government and minister for foreign affairs; immunity *ratione personae* versus *ratione materiae*; immunity from criminal versus civil jurisdiction; and the immunity of officials versus diplomatic immunity — and of the value of cases such as the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case of the International Court of Justice.

He was particularly surprised that the scope of the exceptions to immunity provided for in draft conclusion 23 went far beyond draft article 7 of the draft articles on immunity, which itself was still the subject of controversy. Article 1 of the draft articles expressly stipulated: "The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State." Draft conclusion 23, on the other hand, contained no such provision. Also, draft article 7 mentioned only six international offences, with a reference to a list of treaties set out in the annex to the draft articles that would facilitate understanding of the definitions of those offences. By contrast, draft conclusion 23 referred to "any offence prohibited by … *jus cogens*" in general terms, without any limitations being set or explanations given. He reiterated his view that draft article 7 was not acceptable and said that, in comparison, draft conclusion 23 was even more unacceptable. He therefore objected to referring that draft conclusion to the Drafting Committee.

Ms. Oral, having thanked the Special Rapporteur for his well-researched and insightful report, said that *jus cogens* was indeed one of the more complex, interesting and even enigmatic topics in international law; the key issue of its legal effects in particular had generated much thought and debate. Indeed, she appreciated the rich exchange of views among members, which had but scratched the surface of the subject. Mr. Murase might have been right when he had stated that perhaps a smaller number of draft conclusions would have allowed for even more in-depth consideration of the intricate matters of international law involved in the topic. However, in her view, the report and the proposed draft conclusions constituted a valuable contribution to the Commission's work.

Overall, she agreed with Mr. Šturma and others that the report was well documented and comprehensive and that it contained rich and thorough analysis of the relevant State practice, the case law of international and national courts and academic literature. She also agreed with Mr. Zagaynov that the topic required careful handling, since it would inevitably involve political considerations. Her one critical comment concerned the organization of the report: she shared the view of Mr. Park, Mr. Murphy and others that the 14 draft conclusions could perhaps have been structured in a more coherent, concise and effective way. Moreover, the structure of the report did not follow the order of the draft conclusions, which made it a little more difficult to analyse the Special Rapporteur's substantive grounds for each of the draft conclusions. A summary at the end of each section would have been helpful to the reader.

In general, she accepted the practical and cautious methodology used by the Special Rapporteur, who at the same time provided a measured level of clarification, in particular with regard to the legal consequences of peremptory norms for sources of international law beyond treaties. The commentaries would be an essential component of the Commission's work on the topic in that they would provide the necessary additional clarifications regarding the draft conclusions.

She agreed with draft conclusion 10, which was based directly on articles 53 and 64 of the 1969 Vienna Convention, although paragraphs 1 and 2 contained additional elements that were not taken from those articles: under paragraph 1, a treaty that was void because it was in conflict with a norm of *jus cogens* at the time of its conclusion did not create any

rights or obligations; similarly, under paragraph 2, parties to a treaty that became void were released from any further obligation to perform the treaty. Since the text was a set of draft conclusions aimed at providing clarification rather than a set of draft articles, she was comfortable with those additions. Indeed, she would go so far as to suggest that the term "*ab initio*" should be added after the word "void" in paragraph 1, in order to emphasize that a treaty would be absolutely invalid if it conflicted with a peremptory norm at the time of its conclusion. The use of the term "*ab initio*" would also help to distinguish paragraph 1 from paragraph 2, under which an existing treaty was not void *ab initio* but rather became invalid from the time of the emergence of a new peremptory norm. She also agreed with Mr. Zagaynov that the terminology used should be consistent — either the term "void" or the term "invalid" should be used to describe the consequences of *jus cogens* in relation to treaties — and she appreciated the learned explanation provided by Mr. Rajput in that regard.

In addition, she supported the inclusion of paragraph 3 of the draft conclusion, which was aimed at providing greater protection for the *pacta sunt servanda* principle by allowing courts to interpret a treaty in a way that rendered it consistent with a peremptory norm of international law and by ensuring the stability of treaties. However, she wished to place on the record her disagreement with the reference in the report to the Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom as support for paragraph 3. The action by Turkey to protect the Turkish Cypriots had been taken under the Treaty, in accordance with the legal rights and obligations of Turkey as a guarantor Power in Cyprus, following the attempted coup on the island incited by the junta in Greece with the aim of achieving *enosis*, or union with Greece. Thus the intervention by Turkey had not, in her opinion, been unlawful and had not raised any issues relating to *jus cogens*.

Turning to draft conclusion 11, she said that articles 53 and 64 of the 1969 Vienna Convention contained no reference, either express or implicit, to severability. A *stricto sensu* interpretation of those articles led to the conclusion that a conflict with a peremptory norm would affect the validity of the treaty as a whole. Moreover, article 44, on separability of treaty provisions, expressly stated that there could be no separation of the provisions of treaties falling under, *inter alia*, article 53. However, the Special Rapporteur rightly pointed out that no mention was made in article 44 of article 64, which suggested that, for cases falling under article 64, severability was possible. That understanding was further supported by the commentary to article 61 of the draft articles on the law of treaties. Consequently, she agreed with the Special Rapporteur's conclusion in paragraph 39 of the report that, in the case of existing treaties that conflicted with a new norm of *jus cogens*, severability was an option and was consistent with the 1969 Vienna Convention. Nonetheless, she was somewhat concerned that insufficient guidance was provided on the proper interpretation of the three subparagraphs from article 44 (3) incorporated into paragraph 2 of the draft conclusion. For instance, under subparagraph (c), she wondered in what circumstances the continued performance of the remainder of the treaty would be considered "unjust" and, under subparagraph (b), what would constitute "an essential basis for the conclusion of the treaty". She encouraged the Special Rapporteur to provide more examples clarifying the use of those terms in the commentary.

Under paragraph 1 of draft conclusion 12, parties to a treaty that was in conflict with a *jus cogens* norm at the time of its conclusion had a legal obligation to eliminate the consequences of any act performed in reliance of the treaty. That provision was based on article 71 (1) of the 1969 Vienna Convention, which expressly applied to treaties that were in conflict with peremptory norms at the time of conclusion. However, as had been pointed out by other members, the paragraph in its current form did not fully reflect article 71 (1), in particular because the phrase "as far as possible" was omitted. The paragraph should be redrafted so as to be consistent with article 71 (1); otherwise, an explanation would have to be given in the commentary, as the provision in its current form might be read over-expansively.

Draft conclusion 13 was basically a restatement of the relevant guideline in the Commission's Guide to Practice on Reservations to Treaties; she therefore had no comments on it.

Turning to draft conclusion 14, which was based on article 66 of the 1969 Vienna Convention, she said that procedural safeguards regarding disputes were essential, given that the consequence of a conflict between a treaty and a peremptory norm was termination of the treaty. In paragraph 50 of the report, the Special Rapporteur raised two issues regarding article 66 (a): first, it was not clear who might approach the International Court of Justice and, secondly, it was not clear whether States not parties to the 1969 Vienna Convention might invoke the provision. She had read c... fully the Special Rapporteur's analysis in paragraph 53 of the report, where he drew a fine line between the definition of a party under the 1969 Vienna Convention and the wording of article 66 (a). She had also considered his concerns, set out in paragraph 54, about the risks associated with excluding third parties from access to the procedure available under article 66 (a). After careful reflection, and appreciating the risk of unilateral declarations of invalidity of a treaty on account of conflict with *jus cogens*, as highlighted by the Special Rapporteur, she agreed with the inclusion of a recommendation for a safeguard procedure parallel to that provided for in article 66, as set out in the draft conclusion. She also found interesting Mr. Nolte's proposals concerning a broader approach to procedural safeguards — specifically, that the core procedure set out in article 65 should apply to all sources of law, not only treaty obligations, and that it should be reflected in a new paragraph in each of draft conclusions 14 to 17 or in a new general draft conclusion on procedure — and would support further discussion of that issue by the Drafting Committee.

She agreed in principle with draft conclusion 15, but noted that the commentary thereto would be important and should be aligned with the Commission's work on identification of customary international law. She also agreed with paragraph 3 on the persistent objector rule.

She supported draft conclusion 16 and had no additional comments on it.

With regard to draft conclusion 17, she agreed with the principle that even binding resolutions of the Security Council could not be in conflict with norms of *jus cogens*. The Special Rapporteur had pointed out the lack of actual practice in that regard and also the remote likelihood of such a resolution being adopted. On the question of how the draft conclusion would be implemented, it would be necessary in the commentary to delve into the practical, including procedural, considerations.

She agreed with the principle, set out in draft conclusion 18 and explained in paragraphs 103 to 111 of the report, that peremptory norms of *jus cogens* created obligations *erga omnes*. She also noted that the reverse was not true: not all obligations *erga omnes* were necessarily norms of a *jus cogens* nature. However, as stated in the report, obligations *erga omnes* and jurisdiction were treated as separate issues in judgments of the International Court of Justice.

The elaboration of the relationship between peremptory norms and *erga omnes* obligations was, in her opinion, one of the significant contributions of the draft conclusions. While an obligation *erga omnes* did not necessarily provide independent grounds for jurisdiction, it did provide standing to non-injured States, as shown in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* before the International Court of Justice, in which the Court had found that Belgium, despite the absence of any injury to it, had standing to bring an action against Senegal under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for failure to prosecute or extradite a defendant for crimes of torture.

However, the formulation of the draft conclusion could, in her opinion, be more robust; the Special Rapporteur had taken a rather conservative approach by stating that a breach of an obligation *erga omnes* "concerns" all States. By contrast, in article 48 (1) (a) of the articles on State responsibility, the "collective interest" of States was specifically identified. In her view, the draft conclusion should provide that a breach of an obligation *erga omnes* was a breach that affected the collective interests of States and allowed any State to bring a judicial action against the State in breach. She was also open to the different formulations proposed by Ms. Galvão Teles. Moreover, she agreed that the draft conclusion should be consistent with the articles on State responsibility in that the word "breach" should be qualified by the word "serious".

Draft conclusions 19 to 21 were based directly on the articles on State responsibility and, while they thus restated existing output of the Commission, she agreed with Mr. Šturma's comment that the Commission's previous codification work in that area was relevant to the current topic. She also agreed with his view that it was important to address all the legal consequences of peremptory norms of general international law; in that context, she supported draft conclusions 19 to 21, as well as draft conclusion 13 on the effects of peremptory norms on reservations to treaties.

With regard to draft conclusion 22, there was a rich supply of relevant treaty law and State practice, which the Special Rapporteur had detailed in paragraphs 113 to 120 of the report. It was important to make a distinction between the duty to prosecute crimes prohibited by *jus cogens* and the question of whether a basis for jurisdiction over such crimes existed. The Special Rapporteur had taken that distinction into account in paragraph 1 of the draft conclusion, under which a State's duty to exercise jurisdiction was limited to offences committed by nationals of that State or on the territory under its jurisdiction; under paragraph 2 the door was implicitly left open to the exercise of universal jurisdiction under the State's national law.

On draft conclusion 23, she had already stated her support for the exception to immunity *ratione materiae* during the debate at the sixty-ninth session on draft article 7 of the draft articles on immunity of State officials from foreign criminal jurisdiction. The main questions that she, along with other members, wished to raise pertained to the relationship between the draft conclusion and the Commission's ongoing work on the topic of immunity, and the concerns regarding crimes against humanity raised by Mr. Murphy, who was the Special Rapporteur for that topic. She agreed with Mr. Hassouna that it was important for the Commission to maintain consistency in its work across different topics. In her view, the draft conclusion should be carefully assessed by the Drafting Committee in the context of the Commission's ongoing work on other topics so as not to prejudice that work and to ensure internal consistency. The suggestion by Mr. Jalloh, Mr. Vázquez-Bermúdez and Ms. Galvão Teles that the draft conclusion should be held in abeyance until the Commission had completed its work on the topic of immunity merited consideration.

She recommended that all the proposed draft conclusions should be referred to the Drafting Committee.

Mr. Reinisch said that he wished to congratulate the Special Rapporteur on his rich and insightful report focusing on the intricate and highly relevant question of effects and consequences of *jus cogens*.

The proposed draft conclusions largely reflected the current state of the law as laid down in the 1969 Vienna Convention and corresponding customary international law. That was particularly true of draft conclusion 10. At first sight, paragraph 2 of the draft conclusion, which dealt with the emergence of a new peremptory norm of general international law with which a treaty already in force conflicted, appeared to be a necessary consequence of the general principle of invalidation of a treaty owing to conflicting *jus cogens*. However, without further clarification, the application of that rule was liable to pose considerable difficulty if it was the decisive factor in a case brought before a domestic or international court. The development of a peremptory norm of general international law was a lengthy process requiring an indeterminate amount of time. It could therefore be difficult to ascertain *ex post* at what precise point in time a treaty rule had become void owing to a conflict with a newly emerged rule of a peremptory nature. Admittedly, however, a similar level of uncertainty already existed under article 64 of the 1969 Vienna Convention. In that respect, therefore, the application of draft conclusion 10, as it stood, would not differ substantially from the application of existing treaty law. Meanwhile, the wording of the second sentence of paragraph 2 — "[p]arties to such a treaty are released from any further obligation to perform in terms of the treaty" — had been wisely chosen by the Special Rapporteur, in that the inclusion of the word "further" clearly indicated only an *ex nunc* effect and barred any interpretation to the contrary.

On the issue of severability, draft conclusion 11 provided for a system that was similar to that established under the 1969 Vienna Convention. Under the proposed text, treaties that conflicted with a peremptory norm of general international law at the time of

their conclusion were invalid as a whole, whereas, in the case of the emergence of a new peremptory norm subsequent to the treaty's conclusion, those provisions not affected by the new norm remained in force, provided that certain conditions were met. In that context, he concurred with Mr. Nolte and Mr. Rajput that more detailed consideration should be given to the specific justification for applying different legal consequences in those situations; the *travaux préparatoires* of the 1969 Vienna Convention contained hardly any clear indication on that score. In paragraph (3) of the Commission's commentary to article 61 of the draft articles on the law of treaties (*Yearbook of the International Law Commission* (1966), vol. II, p. 261), it was merely stated that "although the Commission did not think that the principle of separability is appropriate when a treaty is void *ab initio* under article 50 by reason of an existing rule of *jus cogens*, it felt that different considerations apply in the case of a treaty which was entirely valid when concluded but is now found with respect to some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid."

With regard to article 44 (5) of the 1969 Vienna Convention, which ruled out severability in the case of treaties in conflict with existing *jus cogens*, a view had been widely put forward that full invalidation of a treaty was warranted as a "sanction in the interest of international society" against impermissible conduct of States. Such a sanction would not be necessary in the case of a treaty that conflicted with a new peremptory norm: States might not have been able, at the time of concluding the treaty, to foresee the development of such a norm. At any rate, the severability of provisions that violated new *jus cogens* norms reinforced the proposition that the scope of invalidation was generally narrow. After all, article 71 (2) (b) of the 1969 Vienna Convention provided only for an *ex nunc* effect, so that prior rights and obligations might be maintained to the extent that their maintenance was not in itself in conflict with the new peremptory norm of general international law. However, the real issue was whether the strict rule set out in article 44 (5) had in fact been followed in State practice and should be maintained.

The wording of draft conclusion 13, paragraph 2 — "[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*)" — differed slightly from the wording set out in paragraph 76 (b) of the report, which read: "a reservation that seeks to exclude or modify the legal effects of a treaty in a manner contrary to a peremptory norm of general international law (*jus cogens*) is invalid". The latter wording was to be preferred because the idea that such a reservation was considered invalid expressed more clearly the consequences of such a reservation for the applicability of the treaty to the reserving party. In paragraph 75 of the report, it was stated that such a reservation was null and void and did not affect the applicability of the treaty, in accordance with the Guide to Practice on Reservations to Treaties. It might be helpful to note in the commentary that there had also been some academic discussion on that issue.

Draft conclusion 14 largely corresponded to article 66 of the 1969 Vienna Convention, a provision that, thus far, had never been invoked in practice. Under paragraph 1 of the draft conclusion, as under article 66, the International Court of Justice would have jurisdiction over disputes concerning an alleged conflict between a treaty and a peremptory norm, unless the parties opted for arbitration instead. However, it was doubtful whether it should really fall to arbitral tribunals to address fundamental issues of international law such as the identification of peremptory norms. The settlement of disputes by *ad hoc* tribunals always entailed a higher risk of inconsistency than adjudication, even if only because of variations in the constitution of panels. Dispersing competence across such *ad hoc* bodies could run counter to the aim of consolidating the international legal system and achieving legal certainty. For the sake of a clear hierarchy of norms, it might therefore be preferable to entrust only the International Court of Justice with the task of settling disputes concerning the invalidation of treaties owing to conflicting peremptory norms of general international law. Hence, the Commission should consider the possibility of omitting the phrase "unless the parties to the dispute agree to submit the dispute to arbitration".

Turning to draft conclusion 17, he noted that some members had criticized the specific reference to and focus on Security Council resolutions. In his view, however, the

formulation chosen by the Special Rapporteur, which contained a generic reference to "[b]inding resolutions of international organizations, including those of the Security Council of the United Nations", was sufficiently broad to apply to all international organizations, while at the same time highlighting the fact that, in practice, what was really of concern was resolutions of the Security Council under Chapter VII of the Charter that might conflict with *jus cogens*.

In his report, the Special Rapporteur also provided a very helpful overview of international and domestic judicial practice that threw light on the relationship between *jus cogens* and *erga omnes* obligations. Draft conclusion 18 reflected the summary in the report, in accordance with which peremptory norms generally entailed obligations *erga omnes*, whereas not all obligations *erga omnes* qualified as peremptory norms. That view had been widely, though not unequivocally, recognized and accepted in academic writings. The International Court of Justice had also made it clear, in its judgment in the case concerning *East Timor (Portugal v. Australia)*, that a legal interest of a third State in another State's compliance with an international *erga omnes* obligation did not in itself provide a basis for the Court's jurisdiction. The Special Rapporteur had rightly taken account of that *dictum* in paragraph 2 of draft conclusion 14.

It was unclear from the wording of draft conclusion 18 whether it was the breach only of those *erga omnes* obligations established by peremptory norms that concerned all States or whether the breach of *erga omnes* obligations as a whole concerned all States. In paragraph 110 of the report, it was stated that the *erga omnes* character of *jus cogens* explained the interest of third States in a wrongful act committed by one State against another. That appeared to suggest that the former interpretation applied. In that case, it would be helpful to explain in the commentary what was meant by the expressions "concerns all States" and "the interest of third States" with regard to obligations *erga omnes*.

With regard to acts or omissions that third States were permitted or even obliged to undertake as a result of a breach by another State of a peremptory norm of general international law, proposed draft conclusions 20 to 23 included a duty of cooperation and of non-recognition, as well as a duty to exercise domestic jurisdiction, in certain cases even by lifting immunity. It was certainly important to address consequences of *jus cogens* other than the invalidation of treaties, because the invalidation of a treaty constituted only a change in a legal situation and did not necessarily prevent States from undertaking actions inconsistent with a peremptory norm. However, it must be kept in mind that many of those consequences might overlap with issues dealt with in the context of other topics on the Commission's agenda; they should thus be addressed carefully so as to avoid inconsistency.

The duty to cooperate and the duty not to recognize or render assistance, set out in draft conclusions 20 and 21, respectively, were relatively uncontroversial; however, draft conclusions 22 and 23 appeared more problematic. While there was little question that a State had a duty to exercise jurisdiction over crimes prohibited by *jus cogens* that were committed by its nationals or on its territory, as provided for in paragraph 1 of draft conclusion 22, paragraph 2 of the draft conclusion was probably more controversial and might even be misleading. It provided that paragraph 1 did not preclude the establishment of jurisdiction on any other ground as permitted under its national law; thus it appeared to hint at the exercise of universal jurisdiction to prosecute crimes prohibited by peremptory norms of international law. However, as demonstrated in paragraphs 115 to 120 of the report, there was currently no clear consensus in international law as to whether universal jurisdiction was allowed, other than under a specific convention that stipulated it. The wording of paragraph 2 also suggested that other grounds as permitted under national law currently existed; moreover, it did not include the expression "in accordance with international law", which had wisely been included in the summary of the corresponding discussion set out in paragraph 132 (b) of the report. It would be advisable to include that expression in the draft conclusion so as to acknowledge the current ambiguous state of the law, rather than permitting countries to act solely on the basis of national law.

Turning to draft conclusion 23, he said that the proposition set out in paragraph 1 — that a person's official position was irrelevant to his or her criminal responsibility — seemed to be widely accepted nowadays. However, paragraph 2, on the non-applicability of

immunity *ratione materiae*, appeared highly problematic, in particular because it was being dealt with in the context of the Commission's deliberations on the topic of immunity of State officials from foreign criminal jurisdiction. While that debate was ongoing, he preferred to abstain from addressing the issue in the context of the current topic.

The issue of countermeasures was not mentioned in the report. A discussion thereof, and potentially an explicit provision concerning the right of third States to take countermeasures against a State that was in breach of an obligation with *erga omnes* effects, could prove to be a meaningful addition to the Commission's work. The imposition of countermeasures as a consequence of breaches of *erga omnes* obligations — which, as mentioned earlier, included all peremptory norms of general international law — was explicitly provided for in the 2005 resolution of the Institute of International Law on obligations *erga omnes* in international law, article 5 (c) of which read: "Should a widely acknowledged grave breach of an *erga omnes* obligation occur, all the States to which the obligation is owed … are entitled to take non-forcible counter-measures under conditions analogous to those applying to a State specially affected by the breach."

In conclusion, he expressed his sincere thanks to the Special Rapporteur for his excellent and thought-provoking report and said that he supported in principle the discussion of the draft conclusions in the Drafting Committee.

The meeting rose at 5.35 p.m.

Provisional

For participants only

2 August 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3420th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 4 July 2018, at 10 a.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

The Chair invited the Commission to resume its consideration of the third report of the Special Rapporteur on the topic of peremptory norms of general international law (*jus cogens*) (A/CN.4/714 and A/CN.4/714/Corr.1).

Mr. Cissé said that he wished to thank the Special Rapporteur for his excellent report, in which he addressed a complex topic in a manner that was easy to understand. Turning to the proposed draft conclusions, he said that the first sentence of draft conclusion 10 (1) was sufficient in describing clearly the title of the draft conclusion. The second sentence, meanwhile, was somewhat superfluous, as it went without saying that a treaty that was void did not create any rights or obligations for States, regardless of whether or not those States were parties.

Draft conclusion 10 (3) provided that "to avoid conflict with a peremptory norm of general international law, a provision in a treaty should, as far as possible, be interpreted in a way that renders it consistent with a peremptory norm of general international law (*jus cogens*)". The word "interpreted" was, in his view, inappropriate, since the purpose of the provision was to avoid any potential or actual conflict between a legal instrument being negotiated by the parties and a peremptory norm. A legal text was interpreted only once it had been adopted or was already in force. The aim of the paragraph, however, was to avoid conflict by ensuring that treaty provisions that were being finalized or adopted did not violate or clash with peremptory norms of international law. He therefore proposed that draft conclusion 10 (3) should read: "To avoid conflict with a peremptory norm of international law (*jus cogens*), a provision in a treaty that is being finalized or adopted should, as far as possible, be consistent with that norm." [*Pour éviter tout conflit avec une norme impérative du droit international (jus cogens), les dispositions conventionnelles en cours de conclusion ou d'adoption, doivent, autant que possible, être compatibles avec cette norme.*]

Draft conclusion 11 was generally satisfactory. The two paragraphs contained therein described and analysed clearly the issue at hand, namely the severability of treaty provisions in conflict with a peremptory norm. He did, however, have a reservation concerning paragraph 2 (c), which established that "continued performance of the remainder of the treaty would not be unjust". The provision lacked clarity and did little to aid the comprehension of the draft conclusion. Subparagraphs (a) and (b) were sufficiently clear and addressed the issues raised by the draft conclusion. Should subparagraph (c) be retained, its content should be explained in greater detail in the report. Alternatively, it could be deleted and its content dealt with in a more exhaustive manner in the commentary, where it would be appropriate to explain why continued performance of the remainder of the treaty would not be unjust and what was meant by "the remainder of the treaty".

Draft conclusion 14 (2), while relevant, left a degree of ambiguity about the requirement of consent by the parties for establishing the jurisdiction of the International Court of Justice. Indeed, it was not specified whose consent was needed. Did the requirement involve only the consent of States parties to a treaty? What of the consent of third States, bearing in mind the principle that compliance with peremptory norms was an obligation *erga omnes*? In any case, placing emphasis on the requirement of consent for establishing the jurisdiction of the Court and making it a prerequisite for that jurisdiction might contribute to rendering the violation of peremptory norms by a State non-justiciable by the Court, in the event that the former had not consented to establishing the jurisdiction of the latter to adjudicate on such a violation. Although it was firmly enshrined in international law that no reservation could be made to a peremptory norm, the principle of consent as framed in draft conclusion 14 (2) could give States total freedom to reject the jurisdiction of the Court, even in the absence of a formal reservation. It would be advisable for the Commission to contextualize the meaning and scope of the principle of consent to jurisdiction if it wanted peremptory norms to preserve their true nature, as norms from which no derogation was permitted by any means.

In view of the points that he had made, he proposed that draft conclusion 14 (2) should read: "The fact that a dispute involves a peremptory norm of general international law (*jus cogens*) is sufficient to establish, *prima facie*, the jurisdiction of the Court." [*Le fait qu'un différend mette en cause une norme impérative du droit international général (jus cogens), suffit à établir, prima facie, la compétence de la Cour.*] The wording implied that jurisdiction could be established even without the consent of the parties. The words "in accordance with international law" at the end of the sentence proposed by the Special Rapporteur could be deleted as they did not facilitate the comprehension of the draft conclusion as a whole.

Regarding draft conclusion 15 (1), in the French version, he would replace the words "*si elle serait en conflit*" with "*si elle est en conflit*". Remaining in the French text, in draft conclusion 15 (3), it would be more accurate to refer to the persistent objector rule as a "*principe*" ("principle") than as a "*doctrine*" ("doctrine"), given that the term "*principe juridique*" ("legal principle") was more far-reaching in scope than "*doctrine*", which denoted a broad, changeable and vague concept.

Although draft conclusion 18 was satisfactory as it stood, it might be improved by conveying the idea that the breaches referred to therein could be cited or raised by all States, insofar as they related to obligations *erga omnes*.

Draft conclusions 20, 21 and 22 were, to a large extent, well drafted. They could, however, be grouped together into a single draft conclusion comprised of various paragraphs dealing generally with cooperation and, more specifically, with issues related to assistance and the competence of States to establish their jurisdiction over breaches of peremptory norms of general international law.

The two paragraphs of draft conclusion 23 reflected their purpose, namely to prevent a State official who had committed an offence prohibited by a peremptory norm of general international law from using his or her official position as an argument or form of protection against foreign criminal jurisdiction. However, he agreed with Mr. Nolte that the reasoning in the report was incomplete, in that it addressed only immunity *ratione materiae*. What about immunity *ratione personae* when an official had committed an offence prohibited by a peremptory norm of general international law?

The relationship between immunity *ratione personae* and *jus cogens* could not be ignored as, for various reasons, offences prohibited by peremptory norms of general international law were sometimes prosecuted and proved long after their commission, when the perpetrator no longer held an official position. In the interests of consistency with the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction", a paragraph should be inserted on immunity *ratione personae*.

He continued to believe in the usefulness of drawing up an indicative, open-ended list of *jus cogens* norms, as doing so would help to strengthen the recognition of such norms in law as and when relevant cases were brought before international courts. The fact that *jus cogens* norms were dynamic and evolved over time should not hamper the development of a more structuring legal framework to facilitate the progressive framing of *jus cogens* norms. To draw an analogy with the law of maritime delimitation, the main principles of that law had not been defined once and for all in the 1969 *North Sea Continental Shelf* cases. Rather, international courts had developed the law progressively, in a more structured way, as and when disputes had been brought before them. The Commission had to begin somewhere, and an indicative list seemed as good a place as any. Disputes involving *jus cogens* could follow the same path as maritime delimitation disputes, provided that the Commission resolved to take the lead on the matter.

The consideration of regional *jus cogens* was of the utmost importance. Regional *jus cogens* well and truly existed in international law and should be dealt with accordingly, without being viewed systematically as a factor liable to contribute to the fragmentation of international law. How could it not exist when the Charter of the United Nations itself delegated to regional frameworks the resolution of certain conflicts that threatened international security? Regional *jus cogens* and universal *jus cogens* were two sides of the same coin, their purpose being to preserve the core values of the community of nations.

On the basis of his earlier comments, he recommended that all the draft conclusions should be referred to the Drafting Committee.

Mr. Grossman Guiloff said that he wished to thank the Special Rapporteur for the detailed and extensive work that had gone into his third report, which covered the most difficult aspects of the topic, including the legal consequences of *jus cogens*.

In the theoretical debates on *jus cogens*, there was a clash between two important concepts. The first was the need for stable international relations based on observance of the principle of *pacta sunt servanda*, which was an important concept, since State sovereignty and the need for stable international relations could not be taken lightly. The second concept concerned the acceptance of the proposition that there were commonly shared values of such importance that the international community rejected behaviour that violated those values. The very notion of "international community" required the acceptance of some values and the exclusion — deemed essential by the international community as a whole — of some forms of conduct.

The two concepts had been reconciled firstly by a requirement that the commonly shared values should be agreed upon by the international community as a whole and secondly through the fulfilment of procedural requirements when a claim was submitted in relation to a breach of those values. The Vienna Convention on the Law of Treaties was the most authoritative normative arrangement to reconcile the two concepts. Accordingly, for the most part, the issues covered in the report arose for States that had not ratified the Vienna Convention or had made reservations that had repercussions with regard to peremptory norms and, in particular, mechanisms for the settlement of disputes. Following that line of thought, the problem was whether and to what extent the Vienna Convention codified or had become customary international law. In terms of the procedural components, it could not be affirmed that all of them had achieved the status of customary international law. Unfortunately, State practice in that regard was limited. That being said, the need to strike a balance, the need for reconciliation with the concept of *pacta sunt servanda* and the need for commonly shared values had been recognized by the international community. On the basis of that recognition, it could be argued persuasively, through the use of deductive reasoning, that some obligations of a procedural nature could be established, including, at the very least, the obligation to negotiate in good faith. It was also important to understand that, because of the nature of *jus cogens*, there was a need for consequences to flow from *jus cogens* norms, because otherwise, everything would be empty rhetoric, which would affect the legitimacy of the rule of law and the idea that law regulated conduct. In that respect, it was important to take into account the reasoning of the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, in which it had sustained that "articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith". Also relevant in that regard was Article 2 (3) of the Charter of the United Nations, which established that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".

As stated by numerous speakers before him, in analysing each of the draft conclusions presented by the Special Rapporteur, the Commission would be on safe ground so long as it adhered closely to the Vienna Convention, the law of State responsibility and other important contributions that it had made in the past.

As mentioned by Mr. Murphy, among others, it was important to strike a balance in the draft conclusions by following the provisions of the Vienna Convention. Consequently, it would be interesting to hear how efforts to achieve that balance were affected by the merging of the concepts of "termination" and "invalidity" of a treaty, bearing in mind that the title of draft conclusion 10 referred only to invalidity.

As to the interpretation of a treaty provision, there were two possible options. The first, reflected in draft conclusion 10 (3), was to interpret the provision in a manner that rendered it consistent with a peremptory norm of general international law. The second was to interpret it in a way that strictly avoided conflict with a peremptory norm of general

international law. He wondered whether it was possible to formulate a general rule that favoured one interpretation over the other, and whether the Commission should not consider looking at the particular *jus cogens* norm involved. For example, it was generally accepted in the jurisprudence of regional courts and the International Court of Justice that, when interpreting human rights treaties, the humanitarian purpose of those treaties had to be taken into account. Accordingly, should States be given more or less discretion with regard to interpretation when a *jus cogens* human rights norm was involved?

He agreed with previous speakers who had raised the issue of the placement of draft conclusion 12, which dealt with the consequences that arose once it had been established that a treaty was invalid or had terminated. The placement of the draft conclusion would have an impact on the balance of the draft conclusions as a whole.

He generally agreed with draft conclusion 13. The issues arising from it, if any, could be dealt with by the Drafting Committee.

Concerning draft conclusion 14, he shared the Special Rapporteur's desire to recommend procedures regarding peaceful settlement of disputes involving conflict between a treaty and a peremptory norm of general international law. In his view, however, the Commission needed to preserve the voluntary nature of jurisdiction. Moreover, the recommendation to resort only to the International Court of Justice seemed too narrow. There were, after all, other forms of peaceful settlement of disputes. He had listened with interest to the comments of Mr. Reinisch regarding the danger of fragmentation of international law should the Commission include arbitration among those forms, but the international legal community had ways of reacting to hypothetical decisions or agreements that would have an impact on peremptory norms, and there was value in the argument that the Commission should not recommend the referral of every dispute to the International Court of Justice. As he had mentioned before, the issues covered in the report did not arise for States that had ratified the Vienna Convention and had not made reservations to the dispute settlement clause contained therein. The issues did not arise, either, for States that had ratified treaties that included a compromissory clause concerning resort to the International Court of Justice, such as the American Treaty on Pacific Settlement. It might be interesting to compile an inventory of such treaties and the States bound by them, as doing so would allow the Commission to assess the scope of the issue, in relation to which there was limited State practice.

He agreed with Mr. Murphy and other speakers that the Special Rapporteur needed to include general principles of law under the section of his report concerning the consequences of peremptory norms for other sources of international law. Although it was highly unlikely that a general principle would conflict with a peremptory norm, in the interests of consistency, general principles should be included. He agreed, by and large, with the Special Rapporteur's reasoning behind draft conclusion 15.

Concerning draft conclusion 15 (1), he believed that a customary international law rule did not arise if it conflicted with a peremptory norm of general international law. The same was true for general principles and other sources of law, because of the nature of *jus cogens* and because *jus cogens* norms were the result of complex processes. He was of the opinion that, *ab initio*, the Commission should consider that any manifestation, behaviour or statement that conflicted with a peremptory norm did not give rise to a rule of international law.

Regarding draft conclusion 16, he agreed with previous speakers who had called for the term "unilateral act" to be explained in the commentary.

International organizations, by virtue of their international legal personality, were also bound by peremptory norms of general international law. Accordingly, a draft conclusion on the consequences of such norms for international organizations was justified. Needless to say, those consequences were not restricted to the adoption of binding resolutions, but should extend to the duty of non-recognition and all the other legal consequences arising from *jus cogens*. That should be made clearer in the text of the draft conclusions and in the commentaries thereto. Specifically regarding draft conclusion 17, he agreed that the resolutions of organs of international organizations, without exception, must be consistent with *jus cogens* norms. However, like other members, he wondered whether

the Security Council should be singled out in the draft conclusion. He was not convinced by the arguments put forward by the Special Rapporteur in his third report regarding, *inter alia*, the primacy of Security Council resolutions over other rules. In any case, the more complex challenges arose not when the Security Council chose to act, but rather when it did not act. He proposed the inclusion of a statement in the commentary to the effect that compliance with *jus cogens* norms applied to all organs of international organizations. He supported the inclusion of a general draft conclusion explicitly covering all the legal consequences of peremptory norms for international organizations and the provision of further explanation in the commentary.

He agreed that it was appropriate to refer to *erga omnes* obligations in the context of draft conclusion 18 and that the language thereof should closely reflect that of article 48 (1) of the articles on State responsibility for internationally wrongful acts. Those same articles should serve as a model also for draft conclusion 20; any departure from the articles on State responsibility should be explained by the Special Rapporteur.

He supported draft conclusions 22 and 23, as the prohibition of international offences necessarily entailed the obligation to prevent such offences and to punish those responsible for committing them, in line with the principles that followed from the Nuremberg trials and such instruments as the Convention on the Prevention and Punishment of the Crime of Genocide. However, he took issue with the formulation of draft conclusion 22 (1), because it excluded the principle of passive nationality and conflicts of jurisdiction, which should at the very least be addressed in the commentary. Paragraph 2 of draft conclusion 22, as it stood, did not require the exercise of domestic jurisdiction in accordance with international law; he proposed that it should be redrafted to include such a requirement, given the risk of misuse of national jurisdiction.

He agreed that immunity *ratione materiae* should be addressed explicitly in the draft conclusions on the topic at hand, given the many instances of international offences that were committed by persons acting in official positions. However, the immunity of such persons should not be a ground for excluding responsibility. In any event, the Commission should strive for consistency with its work on the topic "Immunity of State officials from foreign criminal jurisdiction" and, accordingly, should refer draft conclusions 22 and 23 to the Drafting Committee and continue its work on the current topic only once draft article 7 of the topic of immunity of State officials had been adopted on first reading.

He agreed with the statement made by other members that commentaries constituted an essential part of the Commission's work, by providing opportunities for constructive, interactive dialogue with the Sixth Committee. While acknowledging the difficulties involved in drawing up an illustrative list of *jus cogens* norms — which should also specify the criteria for inclusion in the list — he was of the view that a list would be useful, in the light of some States' reactions to the topic thus far.

In conclusion, he was in favour of referring all the draft conclusions to the Drafting Committee.

Mr. Jalloh said that he had found the Special Rapporteur's reasons for including a reference to Security Council resolutions, as set out in paragraph 150 of his third report, sufficiently persuasive. It was, in his view, uncontroversial that no one was above the law and that, therefore, the resolutions of the Security Council were subject to the same rules as any other international organization, as set out in draft conclusion 17. It would be helpful if those members who felt that the reference, in the draft conclusion, to Security Council resolutions was "inappropriate" would substantiate their positions. As to Mr. Grossman's comments, it was true that the Security Council did not take action in many situations; however, when it did act, it must do so within the law.

Mr. Grossman Guiloff said that while it was ostensibly not the Special Rapporteur's intention, it appeared, from the current drafting of draft conclusion 17, that the Security Council might have committed acts in conflict with *jus cogens* norms and that it needed to be established that the Council was not above the law.

Mr. Hmoud said that he wished to commend the Special Rapporteur for his third report on peremptory norms of general international law (*jus cogens*), which, despite

dealing with the most difficult aspects of the topic, clearly identified the consequences of *jus cogens* norms for the law of State responsibility. It provided sufficient basis for the draft conclusions, in terms of practice and doctrine, in a manner that was consistent with the 1969 Vienna Convention on the Law of Treaties and other rules of general international law.

While some criticism had been expressed by certain Member States and members of the Commission regarding the fact that the Commission had not adopted those conclusions provisionally adopted by the Drafting Committee, there seemed to be general support for the Special Rapporteur's approach to the topic. He did not see the Commission's method of work on the topic as an impediment to its progress thereon or as negatively affecting the transparency of the Commission's work. Moreover, there seemed to be general support for the Special Rapporteur's approach. States had had the opportunity to react to the Special Rapporteur's reports at the meetings of the Sixth Committee; and, once adopted by the Commission, the draft conclusions and the commentaries thereto would be available for review before being adopted at the second reading stage.

The most challenging aspect of the topic under discussion was the lack of certainty in identifying the consequences of *jus cogens* norms beyond what was contained in articles 53 and 64 of the Vienna Convention. Both practice and judicial pronouncements were scarce in that regard and sources were mostly confined to the literature. Nonetheless, the Special Rapporteur's report sufficiently identified key consequences based on rules in the Vienna Convention, as well as derivatives of the application of the general rules of international law relating to *jus cogens*. That was sufficient to establish the Commission's work on the basis of *lex lata*, although there might be certain conclusions that were more suitable in the context of *lex ferenda*. That would not undermine the Commission's work on the topic so long as there were solid grounds for the adoption of the draft conclusions. The fact that the draft conclusions on consequences mainly derived from two areas of law — treaty law and the law of State responsibility — made the process of identification more attainable. He did not see a reason why the Commission should not include the consequences relating to areas other than treaty law and State responsibility. If such conclusions were either well established as rules or were emerging rules in other areas of law, there was no reason why the Commission should refrain from discussing them under the current topic and, if appropriate, adopt related conclusions.

Recalling that he and a number of other members of the Commission had argued, at an earlier session, that the characteristics and consequences of *jus cogens* norms were heavily intertwined and had thus preferred delaying discussion of the relevant draft conclusion until the Special Rapporteur had analysed the issue of consequences and legal effects of *jus cogens* norms, he said that draft conclusion 2 could now be seen as buttressing the conclusions proposed on the consequences in all the areas identified by the Special Rapporteur.

The invalidity of a treaty was well established as a key consequence relating to *jus cogens* norms, as set out in articles 53 and 64 of the Vienna Convention. However, there was hardly any practice that attested to the extent of invalidity beyond the doctrinal propositions. He was not aware of any instance where an international court had invalidated a whole treaty by virtue of a conflict of any of its provisions with the rules of *jus cogens*, nor of any instance where States had invoked any procedure under articles 65 or 66 of the Vienna Convention or under the relevant treaty regime in order to invalidate a treaty on the basis of a conflict with *jus cogens*. While that should not undermine the content of the rule on invalidity, it was important that the Commission should identify its applicability and the means to put it into effect without threatening the stability of treaty relations. Such matters were related closely to the issue of implementation of international law, but it was important to take into account the need to protect the stability of treaty relations and not to open the door to endless claims of invalidity on the basis of a conflict with *jus cogens* norms. As had been mentioned earlier, international courts had refrained from declaring treaties invalid for good reason and the Commission should be cautious in its approach to the issue, taking into account the tendency towards political advocacy in relation to the implementation of *jus cogens* rules.

While the ordinary meaning of the phrase "in conflict with *jus cogens*" under articles 53 and 64 of the Vienna Convention might be clear, implementation of those articles could

prove difficult. For example, if a treaty allowed for the use of force in the context of collective self-defence but allowed for various interpretations of self-defence beyond its accepted scope, he wondered if that treaty would be considered void or voidable. There were a number of examples of *jus cogens* rules, especially relating to the use of force, human rights and international humanitarian law, in which the principle of *pacta sunt servanda* could be affected if the term "in conflict with" was not clearly interpreted. Further discussion of the matter might be warranted.

He agreed with the Special Rapporteur that article 53 of the Vienna Convention did not allow for severing provisions in conflict with *jus cogens* norms from the treaty itself, thus making the whole treaty invalid. The *travaux préparatoires* for that article made it clear that the intent had been to reach that conclusion and that no subsequent practice existed to suggest that there was a departure from that interpretation. However, as there was no practice of invalidating whole treaties by virtue of a conflict with *jus cogens* norms, the rules of interpretation should be used to determine whether a given treaty rule conflicted with a *jus cogens* norm, with emphasis being placed on the need to interpret, as far as possible, the treaty in a manner consistent with the relevant rule of *jus cogens*.

In the same way, article 64 of the Vienna Convention on the Law of Treaties left the door open for severability and while there was no legal logic for the distinction in treatment between an existing conflict under article 53 and an emerging conflict in article 64, the Commission could not restrict the text of article 64. Therefore, the severability of provisions must be maintained. He agreed, furthermore, that the conditions set out in article 44 of the Vienna Convention were applicable to severability by virtue of article 64 as the former was general in its application to all the sources of invalidity contained in part V of the 1969 Vienna Convention.

Draft conclusion 12, which reflected article 71 (1) and (2) of the Vienna Convention, should be maintained. While he agreed with the Special Rapporteur that consequences of acts performed in reliance on a provision of a treaty that was not in conflict with existing *jus cogens* norms should not be affected, he doubted that the consequence itself could then produce legal effects.

On the procedure for invalidating treaties on account of a conflict with a *jus cogens* norm, the Commission should take a cautious approach in seeking to prevent abuses while taking into account the benefits of establishing such a procedure. If the Commission were to go beyond the conditions contained in article 64 of the Vienna Convention, it might be prudent to provide first for other means of dispute settlement before submission to the International Court of Justice. While that was clearly intended as a way to avoid fragmentation regarding the crucial issue of invalidating a treaty owing to a conflict with a *jus cogens* norm, the Commission should nonetheless make it clear that the International Court of Justice should be a last resort. As highlighted in the report, the possibility of claims of unilateral acts of invalidity remained remote. As such, he did not have strong views on whether to include a procedure for disputes involving treaty invalidation owing to a conflict with a norm of *jus cogens*.

Treaties should, as far as possible, be interpreted in a manner that avoided conflict with *jus cogens* norms; that was reflected, at least partially, in article 31 (3) of the Vienna Convention. In any case, the rules of interpretation contained in articles 31 and 32 of the Vienna Convention should be applied and the language in draft conclusion 10 (3) was appropriate in that it did not attempt to redefine the Vienna interpretation rules. The superior nature of *jus cogens* norms necessarily meant that rules of *jus cogens* would play a primary role in the interpretation of a given treaty, as already demonstrated in a number of cases.

In setting out the effects of *jus cogens* norms on reservations to treaties in the Guide to Practice on Reservations to Treaties, the Commission had not provided that a reservation that conflicted with a *jus cogens* norm was impermissible; however, the content of guideline 4.4.3 was clear in making such a reservation null and void by not allowing it to modify the treaty or its legal effects in line with the relevant articles on impermissible reservations of the Vienna Convention. He therefore supported draft conclusion 13.

He appreciated the Special Rapporteur's analysis of the consequences of *jus cogens* in relation to State responsibility and the draft conclusions proposed in regard thereto. As for the question of whether the Commission should go beyond what was provided for in the articles on State responsibility in terms of the applicability of such consequences only to serious breaches of *jus cogens* norms or whether it should extend such consequences to all breaches, he noted that, in the commentaries to the articles on State responsibility, the duty of cooperation had not, at that time, been considered *lex lata*, but rather an emerging rule. Now that the principle was clearly recognized in practice and court rulings, it was clear that the duty of cooperation to end serious breaches was *lex lata*. He did not see why the Commission should not propose as *lex ferenda* consequences that might eventually develop into *lex lata*. Furthermore, where there was a strong legal basis and policy for confining the duty to cooperate to end serious breaches of *jus cogens* norms, the same was not true regarding the duty not to recognize and the duty not to render assistance to a breach. In other words, it was unconscionable to provide that a State should be allowed to recognize and render assistance to a breach of a norm of *jus cogens* or even a less serious breach. There was no practice or judicial decisions that allowed international subjects to do so. While the articles on State responsibility reflected a compromise or, more precisely, a consensus rule, they did not exclude the possibility of special consequences arising from normal, non-serious breaches of *jus cogens*.

Regarding the role of international organizations as subjects of international law in respect of breaches of *jus cogens* norms, both the Commission's articles on responsibility of international organizations and judicial practice, including the advisory opinion of the International Court of Justice on the *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, confirmed that international organizations had obligations in relation to serious breaches of *jus cogens* norms. Therefore, in the same way as for States, the draft conclusions should provide for the duty of international organizations to cooperate to end serious breaches and, in relation to all breaches of *jus cogens* norms, not to recognize as lawful a situation created by a breach of a *jus cogens* norm or render assistance in the maintenance of such a situation.

He supported draft conclusion 18, noting that if the Commission were to restrict the possibility that *jus cogens* rules had *erga omnes* effects in terms of giving rise to relevant obligations, then it would restrict the implementation of *jus cogens* norms. The report did not cover the content of obligations *erga omnes* beyond serious breaches of *jus cogens* norms; while taking into account the case law of the International Court of Justice, it might be advisable to identify both the character of the *erga omnes* effect of *jus cogens* norms and the *erga omnes* obligations that also reflected norms of *jus cogens*. He noted that the Commission had refrained from doing the latter in its work on the topic of State responsibility.

The consequences of *jus cogens* norms for resolutions of international organizations was an important, practical matter, especially for those who followed the work of the Security Council. After the Cold War, there had been a balance of power within the Security Council, so that resolutions were adopted by consensus; later, however, the legality of Security Council resolutions had come into question, as had the issue of the potentially *ultra vires* acts of the Council. The debate around the matter continued, including with reference to violations of *jus cogens* norms. He was not convinced that the Commission should avoid the issue of the binding resolutions of international organizations. They were acts of subjects of international law that were bound by the rules of *jus cogens* and required to implement their consequences, as recognized by both the International Court of Justice and the Commission in its articles on responsibility of international organizations. In light of that, and taking into account the hierarchy of rules that placed *jus cogens* norms above any other treaty obligations, draft conclusion 17 should reflect that the binding resolutions of international organizations were inferior to *jus cogens* norms. While he appreciated the arguments regarding Article 103 of the Charter of the United Nations and the character of Security Council resolutions under the Charter, there was hardly any support for the proposition that Security Council resolutions could violate *jus cogens* norms. The issue of the conventional hierarchal similarity between *jus cogens* norms and Article 103 of the Charter stopped there. *Jus cogens* norms trumped all other sources, not only treaty obligations. Having said that, he did not see the need to single out Security Council

resolutions in draft conclusion 17, for the same reasons already mentioned by other members of the Commission. Instead, the issue of the binding nature of *jus cogens* norms and their superiority over Security Council resolutions could be discussed in the commentaries, as might other matters, such as sanctions.

It was possible that a unilateral act might bind its author if it was a legal act, but its value beyond that legal effect was doubtful. While such unilateral acts might violate *jus cogens* norms and therefore be a source of responsibility, in addition to creating other consequences, it was not clear that its effects could be confined to the invalidity of the act. Therefore, draft conclusion 16 should also be stated as being without prejudice to other effects of the act that might arise as a result of a violation of a *jus cogens* rule.

He supported draft conclusion 15 regarding both the invalidity of a conflicting rule of customary international law and the inapplicability of the persistent objector doctrine. Nonetheless, the first aspect should be further qualified in order to cover the issue of termination or modification of a *jus cogens* rule by a subsequent *jus cogens* rule having the same character, as envisaged in the last sentence of article 53 of the Vienna Convention. If a conflicting rule of customary international law were not allowed to evolve because it conflicted with a rule of *jus cogens* arising from customary international law, it would be impossible to terminate or modify that rule in any way. That issue should be discussed in the Drafting Committee or in future reports of the Special Rapporteur.

On other consequences in relation to individual criminal responsibility in international law, he agreed that there was sufficient practice to establish a rule on the national criminalization of crimes prohibited by *jus cogens* norms. The fact that territorial or personal jurisdiction existed in all States for crimes that were, in their simple form, elements of crimes prohibited by *jus cogens* norms provided a basis for the inclusion of a rule on territorial and personal jurisdiction over crimes prohibited by *jus cogens* norms, such as that set out in draft conclusion 22.

He agreed that individual responsibility existed under international law for crimes prohibited by *jus cogens* norms and that immunity *ratione materiae* did not exist for such crimes. Nevertheless, he agreed with other members of the Commission that the issue should be deferred for the current topic until the relevant article had been adopted in the context of the topic of immunity of State officials from foreign criminal jurisdiction, notwithstanding the convincing arguments made by the Special Rapporteur in favour of dealing with the issue within the context of *jus cogens* norms.

He supported the inclusion of a non-exhaustive list of *jus cogens* rules for the benefit of the Commission's work and of the international community. He recommended referring all the draft conclusions in the Special Rapporteur's third report to the Drafting Committee.

Mr. Jalloh said that he would welcome further comments from Mr. Hmoud in relation to the way that Security Council resolutions were addressed in the report. Referring to paragraphs 150 to 154 of the report, he said that the Special Rapporteur had presented the reasoning, and described the support expressed by both States and international tribunals, for the view that Security Council resolutions must comply with the peremptory norms of general international law. However, the colleagues who opposed that view had not offered any substantive reasons for doing so. Given the significance of the issue, reasons must be put forward if there was a general wish to rebut the Special Rapporteur's position. While, as Mr. Grossman Guiloff had said, there had certainly been instances of inaction by the international community in the past, the most significant being the case of Rwanda in 1994, if Security Council resolutions did lead to action, that action must clearly be within the law.

The Chair suggested that a mini-debate could be held on the question at the next meeting.

Mr. Al-Marri said that he wished to congratulate the Special Rapporteur on the quality of the report, the first 19 paragraphs of which provided a good summary of the issues involved. Article 53 of the Vienna Convention on the Law of Treaties established peremptory norms as norms that could not be derogated from in international treaties. The principle of peremptory norms was guided by the same objectives in international law as those guiding public law at the national level.

The context in which the Vienna Convention had been adopted in 1969 was very important and had to be taken into account in any subsequent work on peremptory norms. Ensuring that legislation was in line with internationally accepted standards had been at the forefront of concerns in the 40 years following the establishment of the United Nations. At that time, the international community had included a large number of newly independent States and, therefore, great emphasis had been placed on prohibiting the use of violence to pursue national interests, banning occupation and racial or ethnic discrimination and stressing that a nation should have sovereignty over its own natural resources. Outer space and the ocean floor had been considered as assets shared by all of humankind, and the prohibition of torture had become non-derogable.

In developing the articles on responsibility of States for internationally wrongful acts, the Commission had addressed the concept of "international crime", the prevention, prohibition and punishment of which was the shared responsibility of the international community as a whole, as opposed to violations that one State might against another in the field of diplomatic relations. The core aspect of such wrongful actions was that they should be of concern to the entire international community and, from there, the idea of peremptory norms of international law had taken shape.

That had been followed by a maturing of the idea of *jus cogens*, as reflected in the fifth paragraph of the commentary to article 26 on the responsibility of States for internationally wrongful acts, adopted in 2001. The report considered a number of the points raised therein and so provided guidance to aid the Commission's reflection on the legal implications arising from *jus cogens*. The Commission's task was an important one and the challenge before it lay in the scarcity of relevant practice. Many of the draft conclusions proposed derived from the law of treaties, the responsibilities of States and individual criminal responsibility. The comments that had already been made provided a good basis for adopting a body of recommendations in the near future.

Cooperation with other bodies (agenda item 14)

Visit by the representative of the Inter-American Juridical Committee

The Chair welcomed Mr. Salinas Burgos, of the Inter-American Juridical Committee, and invited him to address the Commission.

Mr. Salinas Burgos (Chairman of the Inter-American Juridical Committee) said that the Inter-American Juridical Committee, as one of the principal organs of the Organization of American States (OAS), served as an advisory body to OAS on juridical matters, promoted the progressive development and the codification of international law, studied juridical problems related to integration and sought to harmonize the legislation of the different member States, bearing in mind their various legal systems and traditions. It was composed of 11 national jurists from the OAS member States, who were elected by the General Assembly.

The Committee had held two regular sessions in 2017, at which it had adopted two reports, one on the conscious and effective regulation of business in the area of human rights, and the other on cultural heritage assets. It had also issued a statement on immunity of States and statelessness.

On the conscious and effective regulation of business, the Committee had compiled best practices, legislation and case law in that area and proposed options for moving forward with such regulation, including the proposed guidelines concerning corporate social responsibility in the area of human rights and environment in the Americas that the Committee had adopted in 2014.

The Committee's report on the protection of cultural heritage assets included an analysis of regional and universal legal instruments on that topic, proposals for further developing national implementing legislation and recommendations on inter-State cooperation mechanisms for facilitating regional implementation of those instruments, in particular the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations

(Convention of San Salvador). It also put forward a suggestion that a user's guide should be developed for the implementation of both treaties and soft-law instruments, including strategies for the recovery and restitution of cultural heritage assets, which were part of the region's identity.

The inclusion of the Committee's reports in resolutions of the OAS General Assembly demonstrated the member States' interest in following up on the issues for which the Committee had been given a mandate. The Committee had competence for private as well as public international law, and one of the resolutions adopted called on it to ensure the broad dissemination of the Model Act on the Simplified Stock Corporation, which provided for a hybrid form of corporate organization that made the incorporation of small businesses and microenterprises less costly and cumbersome, thus helping to promote economic and social development in the member States.

The General Assembly had also considered the Model Inter-American Law on Access to Public Information and requested the General Secretariat to promote its implementation and to identify thematic areas that could be updated or broadened and to forward its findings to the Committee. In June 2017, the Assembly had taken note of the Committee's report on human rights and business which, in line with the mandate from the General Assembly, had then been included in the February 2018 working session of the Committee on Juridical and Political Affairs.

During the period under review, the Committee, which could be mandated by the General Assembly to address topics, but could also decide on its own initiative to place topics on its agenda, had also approved the consideration of two new topics: the validity of foreign judicial decisions in light of the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; and binding and non-binding agreements, including the important issue of their legal nature. The latter had arisen from discussions with foreign ministry legal experts in October 2016. The Juridical Committee, meeting in plenary session, had also decided to maintain the following topics on its agenda: immunity of international organizations, the law applicable to international contracts, the strengthening of representative democracy, including the Inter-American Democratic Charter, and application of the principle of conventionality.

The Committee had held its forty-fourth Course on International Law in Rio de Janeiro, Brazil, from 31 July to 18 August 2017. The Course had been attended by 42 participants, 15 of whom had been awarded OAS scholarships. The lecturers for the course had included a member of the Commission, Mr. Vázquez-Bermúdez. Another Commission member, Mr. Grossman Guiloff, would be among the lecturers at the next course, which was due to take place in August 2018. The Committee had also held meetings with representatives of the African Union Commission on International Law and with the Executive Secretary of the Inter-American Commission on Human Rights.

The Committee had held its ninety-second regular session in Mexico City from 26 February to 2 March 2018, during which its activities had included meetings with high-level Mexican officials, including representatives of the Ministry of Foreign Affairs, the Office of the Attorney General of the Republic and the Ministry of the Interior.

During its ninety-third regular session, to be held in Rio de Janeiro in August 2018, the Committee would meet with representatives of the Hague Conference on Private International Law. It would also hold a meeting with legal advisers from the ministries of foreign affairs of a number of member States with a view to continuing discussions initiated two years previously on such topics as immunity, international trade and consumer rights. The Committee would welcome the presence of a member of the Commission at that event.

The Chair said that the Commission appreciated the update on the Committee's work. He noted that four young Latin American jurists were among the 25 participants of the International Law Seminar being held in Geneva.

Mr. Vázquez-Bermúdez said that it had been a great honour for him to visit the Committee in 2017. He would be interested to hear about the progress the Committee had made in its consideration of the topic of binding and non-binding agreements. It was sometimes difficult to distinguish between legally binding agreements and commitments

that were purely political in nature. For example, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, the International Court of Justice had ruled that the parties had concluded a legally binding agreement, despite the assertion of the Foreign Minister of Bahrain that it had not been his intention to subscribe to such an agreement.

Mr. Grossman Guiloff, noting that the topics taken up by the Committee addressed a broad range of issues of interest to society at large, said that it would be interesting to know what selection criteria were used in that connection.

Mr. Ruda Santolaria said that he would be particularly interested to know about the feedback that member States had provided, through the Committee's regular meetings with legal advisers, regarding the topics it had decided to take up and how that feedback had subsequently been taken into account in developing the Committee's activities.

Mr. Nolte said that he would be interested to know whether the Committee had a relationship with the Inter-American Court of Human Rights and how it addressed questions arising from judgments of the Court, including with respect to legislative implementation and interpretation.

Mr. Gómez-Robledo said that it would be useful to hear about the background to the topic of representative democracy and reform of the Inter-American Democratic Charter. Given that contemporary attacks on democracy differed in nature from those that had occurred during the 1970s and 1980s and which the Charter had been intended to address, he asked whether the Committee was working towards presenting proposals for reform of the Charter to the OAS General Assembly.

Mr. Salinas Burgos (Chairman of the Inter-American Juridical Committee) said that the Committee was intending to develop guidelines on distinguishing between legal and political agreements. The Rapporteur for the topic had drafted a preliminary report, which would be discussed in August 2018.

When selecting topics to be taken up, the Committee's principal aim was to ensure that its work would serve the practical needs of the legal community in the Americas. It was also important to consider topics that were relevant throughout the region and to avoid duplicating the work of other bodies, including the Commission. Further considerations included the harmonization of legislation in the inter-American system, given the coexistence of continental and common law traditions in the region.

Although the Inter-American Court of Human Rights was not an OAS organ, the Committee maintained an important relationship with it. While remaining mindful not to duplicate the work of the Inter-American Commission on Human Rights, the Committee did take up topics relating to human rights. It was in the process of considering the principle of conventionality, which addressed the effects of judgments issued by the Inter-American Court of Human Rights on national law and courts in member States. The topic was a controversial one, with opinions polarized over whether judgments applied only to the case and State in question or should be integrated into the national legal system.

With regard to the Inter-American Democratic Charter, the aim was to strengthen the Charter without modifying it. Given that the Charter was a balanced instrument that had resulted from careful negotiations, modifying it could be counterproductive to the defence and preservation of democratic values in the region. The Committee's work on the topic was intended to strengthen the role of the Secretary-General in defending democracy. The main weakness of the Charter was that it lacked preventive tools such as early-warning mechanisms and reporting systems. The possibility was being explored of establishing a unit to defend representative democracy that would operate along the lines of the one in place to protect human rights. The topic was both complex and controversial; in the inter-American system, the principle of non-intervention was sacrosanct.

The meeting rose at 1.05 p.m.

Provisional

For participants only

26 July 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3421st meeting
Held at the Palais des Nations, Geneva, on Wednesday, 4 July 2018, at 3 p.m.

Contents

Peremptory norms of general international law (*jus cogens*) (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.15 p.m.

Peremptory norms of general international law (*jus cogens*) (agenda item 9) (*continued*) (A/CN.4/714 and A/CN.4/714/Corr.1)

The Chair invited the Commission to resume its consideration of the third report of the Special Rapporteur on peremptory norms of general international law (*jus cogens*).

Mr. Peter said that the Special Rapporteur did not need to be apologetic about the length of his report, which was not as long as certain reports that had been produced in the past. Although Commission members were used to considering one, two or three draft conclusions at a time, there were no rules or policies to prevent the Special Rapporteur from proposing a larger number. In view of that, he urged the Commission to place greater emphasis on being more productive.

Peremptory norms of general international law, much like customary international law, had not been developed by all members of the international community as it was currently constituted. Rather, they had been developed by a few States at a time when the majority of States had been subjugated and given demeaning titles such as colonies, protectorates, mandates and trustee territories. Hundreds of treaties had been entered into, purportedly on behalf of the subjugated territories, and some remained in force. Efforts to resist those treaties by invoking principles such as *clausula rebus sic stantibus* — a fundamental change in circumstances — had been unsuccessful. However, he believed that the Special Rapporteur's work on *jus cogens* provided a solution to the problem, notably in draft conclusion 10 (2): "An existing treaty becomes void and terminates if it conflicts with a new peremptory norm of general international law (*jus cogens*) that emerges subsequent to the conclusion of the treaty. Parties to such a treaty are released from any further obligation to perform in terms of the treaty." Such an innovative approach would allow the Commission to move beyond the 1969 Vienna Convention on the Law of Treaties. *Jus cogens* norms, if accepted in good faith, would sanitize international law, which was defective and controlled by a few States owing to its colonial background and the international imbalance of power.

Acknowledging the comments of other Commission members on inconsistencies in the use of words such as "void", "invalid", "arise" and "emerge", he said that such inconsistencies should be rectified, but only after careful consideration. To assist the Special Rapporteur in resolving the issues surrounding the use of the words "invalid" and "void", he wished to draw attention to the case of *A.A. Sisya and 35 Others v. Principal Secretary, Ministry of Finance and Another*, heard by the High Court of Tanzania at Dodoma, in which the judge had ruled that:

> The law which is void … is as if it was not there … a void law is not operative at all and so any title or money paid under a void law are not operative at all. And no one is obliged to pay any surtax under this law which has been declared void. My considered view is that you cannot amend a statute that has been declared void as that is an exercise in futility. It is just common sense that you cannot amend legislation which is non-existent.

It was clear that some of the objections raised about specific draft conclusions reflected the positions expressed by speakers in other forums, for example in relation to the principle of universal jurisdiction. That principle was addressed in draft conclusion 22, though it was not specifically mentioned. The draft conclusion appeared to have solid support among members of the Sixth Committee, which showed that the draft conclusion was in line with the thinking of many. Given that draft conclusion 23 covered virtually the same subject matter as article 27 (1) of the Rome Statute of the International Criminal Court, it was not surprising that those who had opposed the Rome Statute were also vehemently opposed to draft conclusion 23. Nevertheless, he hoped that a sense of fairness would prevail.

He did not believe that it was necessary to divide the draft conclusions into different parts, although it seemed from paragraph 161 of the report that the Special Rapporteur was open to the idea. Rather, it was necessary to match the draft conclusions with the relevant parts of the report and to fit them into the document seriatim. Like several previous

speakers, he would like the Special Rapporteur to provide an illustrative list of *jus cogens* norms. For that purpose, the Special Rapporteur might be interested in the article by Marjorie M. Whiteman entitled "*Jus cogens* in international law, with a projected list", published in the *Georgia Journal of International and Comparative Law* in 1977. However, the number of *jus cogens* norms was likely to have increased since the article's publication.

Noting that draft conclusion 17 had given rise to debate during the previous meeting, he supported the formulation proposed by the Special Rapporteur, in particular the mention of the Security Council. While the arguments for mentioning the Security Council were set forth in paragraph 150, he wished to add that the Security Council had five unelected members who had, for 70 years, wielded immense power and taken decisions with repercussions for the whole world. That was a good reason why the Security Council should be kept in check; it was not above the law and it should bear in mind the need to respect *jus cogens* norms in any action it contemplated. Those who did not want the Security Council to be mentioned should explain their position: it was not enough simply to say that the formulation was "inappropriate". In conclusion, he recommended that the 14 draft conclusions should be referred to the Drafting Committee.

Sir Michael Wood said that although the third report covered much ground with remarkable conciseness, the complexity and importance of the points addressed were such that it might have been better if the Special Rapporteur had given more in-depth consideration to fewer points and produced, say, five or six draft conclusions. Nevertheless, the report had stimulated an interesting and lively debate on *jus cogens* norms and he was confident that the Commission would be able to reach a consensus on the topic. Given that he was broadly in agreement with what many speakers had already said, he would not attempt to be comprehensive in his comments, nor deal with drafting matters or touch on the sometimes imprecise or confusing expressions used in the report, such as "*jus cogens* crimes".

As he had noted in 2017, the Commission had taken a bold step in placing *jus cogens* on its programme of work; he continued to support its efforts on the topic, where there was a pressing need for clarity. *Jus cogens* was, by its nature, potentially disruptive to international law: even the fundamental principle of *pacta sunt servanda* might, in rare cases, have to give way to it. So too might rules of customary international law that would otherwise bind States, general principles of law within the meaning of article 38 (1) (c) of the Statute of the International Court of Justice and — at least theoretically if not in practice — the binding decisions of the Security Council. While the effects of *jus cogens* were all well and good in theory, in practice they posed a serious risk if individual States were able to evade their treaty obligations under customary international law, and even under Security Council resolutions, simply by invoking what they claimed to be a conflict with a *jus cogens* norm. For that reason, States at the United Nations Conference on the Law of Treaties had insisted on the inclusion of the procedural safeguards in section 4 of the 1969 Vienna Convention on the Law of Treaties, in particular articles 65 and 66 (a), as a crucial part of the package on *jus cogens* set forth in the Convention. Even then, not all States had accepted those provisions. It was therefore good that the Special Rapporteur had acknowledged the importance of the procedural safeguards by proposing draft conclusion 14. He agreed with Mr. Nolte's suggestion that the Commission ought to consider the matter further and should strengthen the proposed draft conclusions as much as possible.

Considering that the negotiating history of article 53 of the 1969 Vienna Convention was covered only briefly in the first report (A/CN.4/693), he wondered whether the Commission required a more thorough, systematic and chronological account of the negotiating history of that article, as well as of articles 64 and 66 (a) and other relevant provisions of the 1969 and 1986 Vienna Conventions on the law of treaties. Considering that such an account would be useful for the Commission's ongoing work, he would be interested in hearing the views of the Special Rapporteur, and the secretariat, in that regard.

Turning to the substantive issues raised in chapter III of the third report, concerning the consequences of peremptory norms of general international law (*jus cogens*), he wished to point out that such consequences were referred to as "legal effects" in draft conclusion 1: consistent terminology should be adopted. Section A, entitled "General", did not assist in the understanding of subsequent sections dealing with specific issues and should not be

taken up in the Commission's commentaries. The main problem was that the Special Rapporteur sought to attach legal significance to what had been put forward as essentially descriptive elements, which the Special Rapporteur now termed "characteristics" of *jus cogens* norms.

Those considerations raised questions about draft conclusion 2, as provisionally adopted by the Drafting Committee. Some Commission members had considered it confusing to seek to indicate the "characteristics" of *jus cogens* — or its "general nature", according to the title of that draft conclusion — when the criteria for the identification of *jus cogens* norms were clearly defined in the second sentence of article 53 of the 1969 Vienna Convention. One such criterion was non-derogability, which was not a legal consequence. Those criteria were dealt with more or less satisfactorily in draft conclusions 3, 4 and subsequent draft conclusions provisionally adopted by the Drafting Committee. However, draft conclusion 2 continued to raise serious doubts. What was its purpose? Did it have operative effect, or was it preambular in nature? The Commission must avoid any suggestion that *jus cogens* norms could be identified on the basis of their so-called "characteristics" — some of which were entirely subjective — since such a suggestion would increase the uncertainty surrounding the identification of *jus cogens* norms. He was not personally in favour of keeping draft conclusion 2 in the text, but if it were to be kept, all those questions would need to be addressed in the commentary.

Indeed, his doubts about draft conclusion 2 were reinforced by some passages in the third report. According to paragraph 28, for example, "some members of the Commission and some States" had suggested that the characteristics of *jus cogens* should be "addressed in the context of consequences", while the Special Rapporteur had expressed the view that those characteristics themselves had consequences, claiming that "one of the consequences of hierarchical superiority [was] the invalidating effect on other norms of international law". In short, what had formerly been regarded as descriptive had become something from which consequences were to be drawn, which did nothing to clarify the text of the draft conclusions.

Draft conclusions 10 to 14 concerned specific consequences of *jus cogens* in relation to treaties, restating and seeking to elaborate on some fundamental rules that were already in the 1969 Vienna Convention. In his view, draft conclusions that restated the 1969 Vienna Convention ought to keep precisely to the language of that Convention. He would make some suggestions in that regard to the Drafting Committee.

Draft conclusion 15 sought to describe the consequences of *jus cogens* norms for rules of customary international law. Although he did not disagree with its substance, he was concerned about some of the formulations. For example, according to paragraph 1: "A customary international law rule does not arise if it conflicts with a peremptory norm of general international law (*jus cogens*)." It was difficult to see how a new rule of customary international law that conflicted with an existing *jus cogens* norm could ever come into being, if only to be found to be void. He shared the view attributed to Kawasaki in paragraph 138 of the third report: how could sufficient State practice and acceptance as law come about in conflict with a norm that the international community of States considered to be non-derogable? Further thought should be given to whether the words "arise" in paragraph 1 and "ceases to exist" in paragraph 2 were well chosen. However, he agreed with the Special Rapporteur that there was no reason why a *jus cogens* norm should not arise even if there had been one or more persistent objectors to an emerging rule of customary international law that had the potential to achieve *jus cogens* status.

A separate question was whether a State that had established itself as a persistent objector to a rule of customary international law that later achieved *jus cogens* status would be bound by the *jus cogens* norm, and thus by the rule of customary international law. The Special Rapporteur had concluded that it would indeed be bound, in consequence of the fact that *jus cogens* norms were universally applicable and non-derogable; he was not entirely convinced by the Special Rapporteur's reasoning, although the result was not necessarily wrong.

Regarding draft conclusion 17, which addressed the consequences of *jus cogens* norms for binding resolutions of international organizations, he shared the concerns of other

members concerning the possibility that States might refuse to comply with binding Security Council resolutions based on an allegation of a breach of a *jus cogens* norm. One speaker had mentioned by way of example the Security Council resolutions concerning the surrender of persons accused of the Lockerbie bombing; in fact, the allegations of an unlawful threat of force had been made by Counsel for Libya in the case before the International Court of Justice and had been refuted by the Agent and Counsel for the United Kingdom as having no basis whatsoever in fact. In view of the members' concerns, the inclusion of a separate reference to Security Council resolutions seemed unwise and risked undermining the effectiveness of its resolutions and the collective security system put in place by the Charter of the United Nations, and could even take the international community back to the era of the League of Nations, when each member ultimately decided whether or not to comply with the decisions of the Council of the League.

Noting that the report aimed to cover the effects of *jus cogens* on other main sources of international law in addition to treaties — customary international law, as well as unilateral acts and resolutions of the Security Council under Chapter VII of the Charter of the United Nations — he agreed with other speakers that there was no reason not to deal with the legal effects of *jus cogens* on another source of international law, namely general principles of law within the meaning of article 38 (1) (c) of the Statute of the International Court of Justice.

The assertion in draft conclusion 18 that peremptory norms of general international law (*jus cogens*) "established" obligations *erga omnes* and that the breach of such obligations merely "concerned" all States required careful examination by the Drafting Committee.

Draft conclusion 19 (1), concerning circumstances precluding wrongfulness, should be more closely aligned with article 26 of the articles on responsibility of States for internationally wrongful acts of 2001. Paragraph 2 was a useful clarification. Regarding the explanation of draft conclusion 20, on the duty to cooperate, contained in paragraphs 90 to 94 of the report, the extent to which a duty to cooperate reflected existing law or was a progressive development could be left open, as could the question of what precise obligations flowed from a duty to cooperate. Draft conclusion 20 (1) was closely aligned with article 41 (1) of the articles on State responsibility; however, paragraph 2 did not exactly reflect the language of article 40 (2), which referred to a "gross and systematic failure" by the responsible State to fulfil the obligation. He considered that it should do so, since otherwise questions would arise as to whether the notion of a serious breach had a different meaning in the draft conclusions and the articles. He was not convinced that draft conclusion 20 (3), dealing with possible forms of cooperation, was necessary or desirable, considering that the language did not appear in the articles on State responsibility. Moreover, the terms "institutionalized cooperative mechanisms" and "*ad hoc* cooperative arrangements" were not particularly clear and might be better explained in the commentaries. Draft conclusion 21, concerning the duty not to recognize or render assistance in the maintenance of a situation created by a breach of a *jus cogens* norm, corresponded to article 41 (2) of the articles on State responsibility; however, some members had pointed out that the adjective "serious" had been omitted from the draft conclusion. He believed that the word ought to be included so as to avoid greatly expanding the principle contained in the articles.

Finally, expressing agreement with Mr. Nolte's analysis of the problems arising in respect of draft conclusions 22 and 23, he said that those provisions did not reflect current law and practice and did not properly form part of the Commission's work. Therefore, while agreeing that draft conclusions 10 to 21 should be referred to the Drafting Committee for examination in the light of the Commission's debate, he was against referring the proposed draft conclusions 22 and 23 to the Drafting Committee.

Ms. Escobar Hernández said that it was important to examine the effects of *jus cogens* norms on the international legal order and welcomed the fact that the Special Rapporteur's excellent third report tackled the issue in a comprehensive and pragmatic manner. The Special Rapporteur had not overlooked the fact that the legal and practical basis for the effects described was different for each area covered, as reflected in both the content and structure of his report and the draft conclusions proposed. The draft

conclusions could be separated into three groups, dealing respectively with the effects of peremptory norms on sources of international law and other acts that could give rise to legal obligations (draft conclusions 10 to 17), the effects of peremptory norms on State responsibility (draft conclusions 18 to 21) and the effects of peremptory norms on individual criminal responsibility and immunity from jurisdiction in respect of what the Special Rapporteur referred to as "*jus cogens* crimes", though that terminology seemed somewhat dubious.

With regard to the issues covered by the first group of draft conclusions, she welcomed the fact that the Special Rapporteur had looked not only at treaties but also at other sources of international law and at acts that could give rise to rights and obligations. If the concept of a peremptory norm was characterized by an element of hierarchical superiority, the Commission must examine the effects of such norms on all sources of international law and on any other instrument — normative or otherwise — capable of creating international obligations. She therefore welcomed the draft conclusions dealing with the effects of *jus cogens* on treaties and customary norms, which were undeniably normative and sources of international law, and the inclusion of draft conclusions on the effects of *jus cogens* on unilateral acts and resolutions of international organizations, insofar as they could generate international obligations, although she did not altogether share the Special Rapporteur's views on the nature of such instruments. That said, it was also important to consider the effects of *jus cogens* on general principles of law, which should be the same as for other international norms. Failing to examine the issue would sow confusion and required greater justification than was given in the report.

Certain statements made in the report and some of the draft conclusions proposed called for further reflection. The Special Rapporteur had given particular weight to the effects of peremptory norms on treaties, which was understandable, especially as the concept of *jus cogens* had first been codified in the 1969 Vienna Convention on the Law of Treaties. It was likewise logical that he had striven to reflect the provisions thereof closely, such as by distinguishing between invalidity of a treaty under article 53 of the Convention and invalidity and termination under article 64. In places, however, the text of the draft conclusions departed from that of the Convention, sometimes unacceptably.

Draft conclusion 10 dealt with two separate points: the invalidity of a treaty that conflicted with a peremptory norm of international law and the specific consequence of invalidity and termination set out in article 71 (2) (a) of the 1969 Vienna Convention. While the Special Rapporteur had clearly sought to ensure parallel treatment for invalidity under article 53 and invalidity and termination under article 64, it would be useful for the distinction to be explained in the commentary so as to avoid any confusion or erroneous interpretation of draft conclusion 10 and its scope. The wording "any further obligation" in draft conclusion 10 differed from that of article 71 (2) (a). Similarly, the words "as far as possible" did not appear in paragraph 1 of draft conclusion 12, which otherwise reflected article 71 (1) (a) of the Vienna Convention. Their omission, albeit perhaps motivated by a desire to strengthen the effect of peremptory norms, had significant consequences that were hard to justify, particularly in terms of acts performed in good faith under a treaty that was subsequently invalidated. The paragraph should therefore be altered accordingly and an explanation included in the associated commentary, referring to the principle of good faith. Paragraph 2 of draft conclusion 12 should be aligned more closely with article 71 (2) (b) of the Vienna Convention: as currently drafted, it was more restrictive than that provision in both letter and spirit. The report contained no clear rationale for referring to a direct conflict between a right, obligation or legal situation and a peremptory norm, rather than between a new peremptory norm and the maintenance of rights, obligations or situations created prior to the emergence thereof.

In the Spanish version of draft conclusions 10, 11 and 12, it would be preferable to render the notion of being in conflict with a peremptory norm by the terms "*estar en oposición*" or "*ser incompatible*", rather than "*estar entrar en conflicto*", in line with the usage in the Vienna Convention. The choice of terminology could be explained in the commentary with a view to ensuring uniform interpretation. With regard to draft conclusion 13, the Drafting Committee might wish to consider aligning the text more closely with

guideline 4.4.3 of the 2011 Guide to Practice on Reservations to Treaties, on which it was based.

In draft conclusion 15, the content and structure of which she generally agreed with, the Special Rapporteur had apparently sought to establish a parallel with the effects of *jus cogens* norms on treaties. In the commentary, it would be useful to give a detailed explanation of the particular difficulties that arose in terms of derogating from a peremptory norm of general international law, which could be customary in origin, by virtue of a subsequent norm of general international law having the same character, which might also be of customary origin. She shared the Special Rapporteur's view that the persistent objector rule was not applicable in the current context, but it might be useful for the Drafting Committee to review the draft conclusion so as to clarify its scope and avoid any confusion over the distinction between the role of States in the process of creating a peremptory norm and the absolutely binding nature of such a norm once identified as such.

The report referred to unilateral acts in a rather vague manner not entirely compatible with the Commission's previous work on the subject. The link drawn between unilateral acts and reservations to treaties gave particular cause for concern, as it was potentially confusing to States and others in the legal sphere. While both were expressed by means of unilateral declarations, they differed in purpose — serving to create and to avoid or modify obligations, respectively — and had been handled differently in practice by States, international tribunals and the Commission. The distinction seemed to be reflected in the draft conclusions, in that the effects of peremptory norms on reservations and unilateral acts were covered separately, but it should be made sufficiently clear, if only in the commentary to draft conclusion 16. Alternatively, the problem could be obviated by referring to unilateral acts as "unilateral acts of States".

The intent of draft conclusion 17 (1) — to reaffirm the primacy of *jus cogens* with respect to binding resolutions of international organizations — was sound, but some redrafting might be needed to make it clear that all such resolutions were covered and that its scope was not restricted to resolutions of the Security Council. As not all international organizations passed "resolutions", even though their decisions might be binding, a phrase such as "binding resolutions and other acts of the same nature" [*las resoluciones vinculantes y otros actos de igual naturaleza*] would be less limiting. However, she had no objection to referring specifically to resolutions of the Security Council, which was bound by the principles and provisions of the Charter of the United Nations, many of which were themselves peremptory norms. The fact that the primacy of obligations under the Charter stemmed from a treaty provision — Article 103 of the Charter itself — rather than from customary international law reinforced the position that binding resolutions of bodies such as the Security Council were subject to *jus cogens* norms, irrespective of whether such a situation was likely to arise in practice.

Issues of interpretation and dispute resolution should be approached not just from the perspective of treaties but more generally, and should be dealt with in specific draft conclusions placed after the section covering the effects of peremptory norms on sources of international law and other acts giving rise to international obligations. The principle of consistent interpretation could play a useful role in avoiding incompatibility with norms of *jus cogens*. Paragraph 3 of draft conclusion 10 could potentially be combined with paragraph 2 of draft conclusion 17; either way, the use of the phrase "as far as possible"/"to the extent possible" should be explained in the commentary to ensure that the provision could not be interpreted as excluding the binding acts of some bodies from the scope of peremptory norms. In the context, the phrase must be taken to mean that a consistent interpretation could only occur where technically possible and feasible.

She shared the concerns expressed regarding the potential consequences of submitting disputes involving conflict between a treaty and a peremptory norm to arbitration, as envisaged in draft conclusion 14. It would be better for all such disputes to be submitted to the International Court of Justice, although there should be no effect on the rules regarding the Court's competence, which could not in any case be altered by a text such as the present draft conclusions. Equally, the draft conclusion should not merely refer in general terms to the means of settling disputes given in Article 33 of the Charter, as that was not the approach previously followed by States, particularly in the 1969 Vienna

Convention. At the United Nations Conference on the Law of Treaties, States had agreed to establish a special mechanism for settling disputes involving peremptory norms, as outlined in article 66 (a) of the Convention. The Drafting Committee should consider rewording the draft conclusion to take account of that and other concerns expressed.

With regard to draft conclusion 18, there was a clear need to distinguish between peremptory norms and norms giving rise to obligations *erga omnes* and to avoid creating any hierarchy among norms of *jus cogens*. The wording of the draft conclusion should be reconsidered, taking into account the specific proposals made by Ms. Galvão Teles, among others. Draft conclusions 20 and 21 should be harmonized with article 41 of the articles on State responsibility. In particular, they should both refer explicitly to serious breaches of peremptory norms. Omitting the word "serious" would suggest that the Commission had decided to follow a new course and would need to be justified appropriately, but its third report provided no such justification for departing from article 41 in that respect. Draft conclusion 19 could usefully be supplemented by the addition of a separate draft conclusion dealing with countermeasures. In general, the group of draft conclusions relating to the effects of peremptory norms on State responsibility should also cover the effects of such norms on the responsibility of international organizations, on the basis of the corresponding articles adopted by the Commission in 2011.

Concerning draft conclusions 22 and 23, she fully concurred with the view of the Special Rapporteur and others that, in the light of State practice and the interest States had shown, the issues they covered must be addressed as part of the Commission's work on peremptory norms. She saw no reason not to include draft conclusions 22 and 23. Regardless of whether the precise legal foundation for the duty to exercise domestic jurisdiction over crimes prohibited by peremptory norms, as set out in draft conclusion 22, lay in treaty or custom, that duty could derive from the duty to cooperate in bringing any serious breach of a peremptory norm to an end, in line with article 41 of the articles on State responsibility, and was also linked to the duty not to render aid or assistance in the maintenance of a situation created by a breach of a peremptory norm. Draft conclusion 22 was balanced, providing for the obligation of a State to exercise jurisdiction over offences committed by its nationals or on territory under its jurisdiction, but also referring in non-binding terms to the possibility of establishing jurisdiction on other grounds under its national law. The Drafting Committee might wish to alter the wording of paragraph 2 to clarify that it was a "without prejudice" clause. Draft articles already approved on other topics could serve as a model.

She had no objection in principle to the structure of draft conclusion 23, which maintained the distinction between the irrelevance of official position in determining individual criminal responsibility, on the one hand, and immunity *ratione materiae* and exceptions to such immunity, on the other. That distinction was both reflected in international instruments — such as article 27 of the Rome Statute of the International Criminal Court — and widely supported by practice. Nevertheless, there was potential overlap between draft conclusion 23 and the Commission's work on other topics, particularly the draft articles on crimes against humanity and the draft articles on immunity of State officials from foreign criminal jurisdiction. As Special Rapporteur for the latter topic, she was convinced that irrelevance of official position was an essential element in establishing criminal responsibility for crimes under international law and that immunity *ratione materiae* was not absolute but subject to limits and exceptions. However, she said no wish to reopen the debate that had led, *inter alia*, to the adoption by majority vote of draft article 7 of the draft articles on immunity of State officials. In procedural terms, any overlap or interference between the two issues should be avoided if possible so as to ensure coordination in the Commission's work, which was vital to its legitimacy. Without pronouncing on the merits of draft conclusion 23, she agreed that it might be advisable to postpone the debate until the draft articles on immunity of State officials had been adopted on first reading and the draft articles on crimes against humanity had been adopted on second reading. Draft conclusion 23 could be referred to the Drafting Committee in the meantime.

In terms of future work, providing an illustrative list of peremptory norms would add value to the work of the Commission, despite the inherent risks. A carefully [illegible]

approach would be [illegible] with particular attention paid to ensuring that the list contained only those norms the [illegible] peremptory nature of which was incontrovertible and uncontroversial and avoiding any [illegible] possible interpretation of such a list as a *numerus clausus*, given the dynamic nature of [illegible] international law. Despite her serious reservations about the posited existence of regional *jus cogens*, she awaited the outcome of the Special Rapporteur's research on that subject with interest and hoped that he would proceed with caution, taking into account the concerns expressed by various members of the Commission. Reiterating her appreciation for [illegible] third report, she recommended transmitting draft conclusions 10 to 23 to the Drafting Committee.

The Chair, speaking as a member of the Commission, said that his reading of the Special Rapporteur's third report had left him in somewhat of a quandary. In assigning a topic to a special rapporteur, the Commission expected him or her to map unknown areas of the international legal universe rather than merely redraw the lines that had been known for generations. Unfortunately, his impression was that, in his third report, the Special Rapporteur had largely relied on what the Commission had stated in reports and commentaries on other topics instead of making any fresh proposals concerning *jus cogens* norms. Likewise, the sources cited in the references were mainly the work of the Commission and the Vienna Convention, with very little other material. In his view, the Special Rapporteur had not gone far enough. Given that the Commission's reports were meant to be perceived as authoritative in the wider field of international law, it should strive to bring something new to the topic or, if that was not feasible, at least critically reassess whether what it had written in the last century still held value today. The Special Rapporteur's third report did neither.

During the debate in the Sixth Committee on the controversy surrounding draft article 7 on the immunity of State officials from foreign criminal jurisdiction, the French delegation had warned of the risk of the Commission working too rapidly. The same applied to the current topic. The Special Rapporteur seemed keen to conclude the work on the topic expeditiously, but that might come at the expense of thorough, detailed work or by circumventing controversial issues, as had been noted by Mr. Murphy and Mr. Murase.

He was not always convinced by the manner in which the Special Rapporteur supported his claims with references. For instance, footnote 27 was intended to support the claim that only some States had expressed disagreement with draft conclusion 2 of the previous report, but the States it listed included the United Kingdom, Russia, the United States, China and France, in other words the five permanent members of the Security Council. Footnote 129 defeated its own purpose: the fact that there were already claims seeking to invalidate a treaty on account of conflict with *jus cogens* was evidence that the possibility of such claims was not remote, as asserted by the Special Rapporteur.

He would limit his comments on the content of the report to two areas: the relationship between *erga omnes* obligations and *jus cogens*, and the relationship between customary law and *jus cogens*.

To his mind, it would have been more appropriate to deal with the former in one of the earlier reports. The third report would have benefited from a more thorough discussion of theoretical considerations but instead focused on technicalities under the guise of "practice". The perspective on *erga omnes* obligations presented in the report was very limited and, frankly, conservative. More recent developments, such as the discussion of whether *erga omnes* obligations could follow from rules of environmental protection, were not touched on in the report. He therefore urged the Special Rapporteur to reconsider that issue in more depth and avoid what might seem like simplistic conclusions for the sake of concluding a first reading on the topic in 2019.

Addressing the relationship between *jus cogens* and customary international law, he could not fail to notice that one of the decisions taken in 2017 had come back to haunt the Commission. The fact that the Commission's definition of *jus cogens* had been based on article 53 of the Vienna Convention meant that it now very closely resembled customary law. He agreed with the content of draft conclusion 15 — peremptory norms would not be peremptory if they could be superseded by regular norms of customary law, and there could not be a persistent objector with regard to *jus cogens* — but he did not understand the

reasoning behind it. As he had stressed previously, the Commission could not, on the basis of the content of the current report and the previous reports on the topic, explain what made *jus cogens* norms different from norms of ordinary customary international law. A conception of *jus cogens* based on consent — acceptance and recognition by the international community of States — did not provide a satisfactory explanation for the peremptory nature of *jus cogens* norms, failed to distinguish *jus cogens* from other norms of international law and, ultimately, remained an empty concept. Customary law was clearly based on consensual international law, but unless the Commission decided that *jus cogens* could only emerge if States unanimously agreed on which norms were *jus cogens*, a decision deliberately not taken in 2017, State consent was not the exclusive basis for *jus cogens*. The Commission continued to circumvent the discussion of that extra element which distinguished customary law and *jus cogens*.

In addition, it could be argued that the first two paragraphs of draft conclusion 15 were superfluous. If the processes of creating customary law and creating *jus cogens* were as proximate as had been asserted in the discussion on the topic, two mutually exclusive norms could not emerge in practice. While draft conclusion 15 could certainly be adopted as currently worded, at some point the Commission must find a satisfactory explanation for the difference between customary law and *jus cogens*.

Finally, there was an issue of consistency in the report: if *jus cogens* trumped customary law, did it matter whether there was an exception for violations of *jus cogens* norms in the customary law of immunity *ratione personae*? The whole section on the effects of peremptory norms of general international law on immunity was based on the premise that there must be an exception in the customary law of immunity of State officials in order for *jus cogens* norms to supersede the customary norms of immunity. If draft conclusion 15 was taken verbatim, it could be argued that it was irrelevant whether the norms of immunity contained such an exception, as long as a *jus cogens* norm had emerged which required absolute prosecution of all perpetrators. The latter question could arguably be a matter for the illustrative list of *jus cogens* norms, if the Commission decided to include such a list, or could be discussed in the context of the third report, as it addressed a consequence of *jus cogens*, albeit a specific one. In any case, the argumentation on that issue in the third report was lacking in depth.

In closing, he urged the Special Rapporteur to pursue his journey into the unknown areas of the international legal universe. The topic was of utmost importance and would benefit greatly from a disclosure of the new discoveries that the journey might bring. He was in favour of referring the draft conclusions to the Drafting Committee, in light of the plenary debate and on the usual understandings.

Mr. Jalloh said that it had been his understanding that the Commission would return to the mini-debate that had begun in the plenary that morning in relation to the specific mention of the Security Council in draft conclusion 17 although, given the time constraints, he realized that might not now be possible. He noted with interest that many of those who had spoken on the issue did not question the legal argument put forward by the Special Rapporteur, and some even supported his position. He personally hoped that the substantive point raised in relation to draft conclusion 17 could be referred to the Drafting Committee for discussion, although, as chair of the Drafting Committee, he would not be able to participate in that debate. By raising the question, he was not in any way suggesting that there was not a role for the Security Council under the Charter of the United Nations; the legal argument made by the Special Rapporteur was very sound. Although members had expressed their personal preferences for omitting a reference to the Security Council, he had heard no convincing legal arguments for doing so.

The Chair said that, although it was traditional practice for the Chair to be the last speaker on a topic, as Mr. Gómez Robledo had been unable to attend the earlier meetings at which the Special Rapporteur's third report had been discussed, he would give him the floor to make his statement. Given the limited time and other pressing items on the programme of work, it had unfortunately not been possible to return to the issues raised that morning by Mr. Jalloh concerning draft conclusion 17. In any case, if the Commission decided to refer the draft conclusions to the Drafting Committee, the matter could be discussed further in that context.

Mr. Hmoud, speaking on a point of order, said that it had been his understanding that the end of that afternoon's meeting had been set aside for the Working Group on the Long-term Programme of Work.

The Chair said that it was true that it had been agreed that, time permitting, the Commission would move on to the long-term programme of work after the conclusion of the debate on *jus cogens*. However, as the Commission had not yet finished its consideration of the report, there would not now be sufficient time for the Working Group to meet.

Mr. Nolte, also speaking on a point of order, said that, if the Working Group would not be meeting, the remaining time could be used to resume the discussion on draft conclusion 17.

Mr. Gómez-Robledo said that he would focus his comments on the issues raised in paragraphs 150 to 159 of the Special Rapporteur's third report. It seemed that the controversy surrounding those paragraphs and draft conclusion 17 had arisen in part because, indirectly at least, they put forward a constitutionalist theory about the Charter of the United Nations, according to which Article 103 introduced the principle of normative hierarchy by which the Charter prevailed over all international law and would have the effect of invalidating any treaty that was in conflict with it. That theory was based on a belief that the Charter had created a new world order that regulated all aspects of relations between States, and encompassed an international system of governance based on its principal organs, whose work had facilitated a dynamic interpretation of the Charter's provisions, as was the case in domestic law systems.

However, in his view, that belief did not take account of the imperfections of international society and was more of an act of faith in an ideal world than the result of a rigorous analysis of positive law. According to most of the literature, the intent of Article 103 was more modest, and involved establishing priority between the applicable rules. In fact, Article 103 did not refer to nullity or invalidity but simply stated that obligations under the Charter would prevail over obligations that were in conflict with them. The State thus had an obligation to set aside the other obligation and to give priority to the obligation under the Charter. It would therefore be more reasonable to consider Article 103 as a means of guaranteeing that the obligations established under the Charter were fulfilled effectively and not of derogating from other treaty regimes, however serious the conflict between the obligations. In his view, Article 103 was a provision that aimed to resolve any conflicts that arose between obligations. As such, he wondered what purpose it would serve to establish that an obligation arising from a Security Council resolution would be invalid if it conflicted with a *jus cogens* norm.

Having said that, he considered it entirely appropriate to follow the approach proposed by the Special Rapporteur because the actions of the Security Council were subject to the Purposes and Principles of the Charter. Moreover, it was safe to say that the Security Council had to comply with the most basic principles of legality. Increasingly, there were calls for Security Council resolutions to be based on international law and for the international rule of law to apply to both their procedural and substantive aspects. As the Special Rapporteur had noted, there were no examples of a norm flowing from a Security Council resolution having been declared invalid because it was in conflict with *jus cogens*, but that possibility could not be ruled out entirely. To his mind, draft conclusion 17 did not affect the authority of the Council; on the contrary, it provided added value in relation to both the rule of law and *jus cogens* norms. It was thus a welcome development, in a similar vein to the non-exhaustive list of *jus cogens* norms. He disagreed with those members who did not believe that it fell under the scope of the topic and he was in favour of sending draft conclusion 17 to the Drafting Committee.

Mr. Nolte said that he too would like to share his views on the issue raised by Mr. Jalloh. There was consensus among the Commission members that draft conclusion 17 should be referred to the Drafting Committee. Paragraph 1 established that the binding resolutions of international organizations did not establish binding obligations if they conflicted with a peremptory norm of general international law. Security Council

whether they were mentioned explicitly or not, and no members appeared to dispute that idea. Therefore, the question before the Commission was whether to expressly mention the Security Council or not. The Commission must decide whether emphasizing that point was the right thing to do politically; there would be no convincing legal arguments either way. Of course, there was a reason why drafters often preferred more general and abstract language: if reference was made to particular institutions or events, the risk was that the rule might very quickly appear outdated. In 10 years' time a conclusion containing a specific reference to the Security Council might seem outdated. That consideration should always be kept in mind by drafters and was, in his view, a persuasive argument against including such an explicit mention, although there were certainly others.

Mr. Grossman Guiloff said that there was clearly a substantial level of consensus among the Commission members, and everyone agreed with what was said in paragraph 1 of draft conclusion 17. However, some members were not in favour of singling out binding obligations in the draft conclusion. There also seemed to be general agreement that, as stated in paragraph 151 of the Special Rapporteur's report, although the possibility of the Security Council adopting a resolution which, on the face of it, was in conflict with a peremptory norm of international law was highly unlikely, it was, nonetheless, not impossible. He found it surprising that, in paragraph 152, the Special Rapporteur attached such weight to the views of a single individual who had expressed doubt as to the correctness of the notion that a Security Council resolution was invalid if it conflicted with *jus cogens*.

Of course, there were some valid political reasons to be taken into account and, as Mr. Peter had noted, it was important to be aware of the changing circumstances of the international community. Given that many actors were now avoiding a rule-oriented approach to international relations, the Commission should consider the changing context of rules and the value of formal processes. To his mind, it was not necessary to mention in the draft conclusion that the resolutions of the Security Council could not violate *jus cogens*, as that point would be made in the commentary. Given the already high level of agreement among the members on the matter, he did not see why it could not be left to the Drafting Committee to come up with a satisfactory solution; it need not become an issue of principle. While he did not agree with Mr. Jalloh and Mr. Tladi, they had put forward persuasive arguments, which he looked forward to discussing further. If Mr. Jalloh felt very strongly about the issue, perhaps he could ask another member to chair the meeting of the Drafting Committee at which it was discussed so that he could participate in the debate.

Mr. Šturma said that, while he did not have any substantive objection to mentioning the resolutions of the Security Council in the draft conclusion, he supported the proposal by Mr. Nolte to use more general language, although he would do so for legal rather than political reasons. Emphasizing Security Council resolutions in draft conclusion 17 might lead to a relatively narrow interpretation of what was meant by "resolutions". To his mind, it would be preferable to refer to "binding acts of international organizations", which was much broader and would also include the many binding acts of the European Union, which created more difficulties than the relatively few resolutions adopted by the Security Council. Of course, such a formulation would not exclude Security Council resolutions, and further explanation could in any case be given in the commentary.

Mr. Hmoud said that international organizations were subject to international law and bound by *jus cogens*, and their acts, including binding resolutions, must comply with *jus cogens* norms. If they were in violation of such norms, the organization assumed international responsibility. In his opinion, it was therefore not necessary to highlight the Security Council specifically; it would suffice to refer to "acts and legal resolutions of international organizations".

Sir Michael Wood said that he did not generally believe that mini-debates were helpful in adding clarity, and the current one was the perfect example of that. During the discussion thus far, many very abstract and general positions had been taken, and sweeping statements made about *jus cogens*, about the effect of Article 103 of the Charter, and about Security Council resolutions. He wished to place on record that he was not one of those who generally agreed with the views that had been expressed in the mini-debate.

Mr. Saboia recalled that, when he had made his statement on the report during the first part of the session, he had said that the Security Council was obviously under the obligation to respect international law and comply with norms of *jus cogens*. It was true that he had, on several occasions, expressed concern about some of the resolutions of the Security Council because it sometimes acted on subjects that were controversial and whose legality could be questioned. However, in the case of draft conclusion 17, he shared the view of those members who would rather make a more general statement in the provision itself and leave an express mention of the Security Council, including an explanation of potential concerns in relation to some of its resolutions and those of other organizations, for the commentary.

Mr. Wako said that the Special Rapporteur's reasons for formulating draft conclusion 17 as it stood were set out quite clearly in paragraphs 150 to 152 of the report. That reasoning should not be lost in the reformulation of the draft conclusion. As stated in paragraph 150, as a rule, resolutions of international organizations were not binding under international law. However, the draft conclusion was intended to address the fact that some bodies, such as the Security Council, could actually pass resolutions that were binding, and those resolutions must comply with *jus cogens*. If the Commission were to opt for more general language, that element would be lost. He would therefore propose keeping the original wording or, as a compromise, referring to "resolutions of international organizations, whether binding or not".

Mr. Peter said that it was clear that the very mention of the Security Council instilled fear in many members. They referred to political arguments for not mentioning the Council, but without entering into specifics.

Mr. Huang said that he would gladly explain why he did not believe it was appropriate to specifically mention the resolutions of the Security Council. Firstly, it would be risky from a political point of view. The current international order was based on the outcome of the Second World War, and that political reality had been reflected in the Charter of the United Nations. One could direct criticism at the Security Council but one could not challenge its legality if resolutions were made in accordance with the provisions of the Charter.

Secondly, such a reference in the draft conclusion was not legally justified. The only criterion for the legality of a binding resolution adopted by the Security Council was that it must have received more than nine votes from Council members, including the five permanent members. The Charter did not provide for any judicial or constitutional review system and even the General Assembly could not overrule a Security Council resolution. Security Council resolutions could only be changed by the Council itself. The Charter clearly provided that binding decisions of the United Nations must be implemented by the United Nations as a whole and all its Member States. If the Commission were going to challenge the legality of Security Council resolutions in the context of *jus cogens*, that would open the way for any Member State to do the same, thus jeopardizing the entire United Nations system. While he respected Mr. Peter's views, it was important to be constructive rather than destructive.

Thirdly, there were no procedural safeguards. The Special Rapporteur had mentioned the idea that resolutions of the Security Council that were in conflict with a norm of *jus cogens* were invalid, but that was not for scholars, States, institutions or even the General Assembly to decide. Fourthly, the Commission had a mandate to engage in codification and progressive development of international law, but such a provision would fall under neither part of that mandate, as there was no practice to codify or on which to base progressive development.

The Chair said that the Commission had thus concluded the debate on the Special Rapporteur's third report and would hear his summing-up at its next plenary meeting.

The meeting rose at 6 p.m.

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